TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 279.

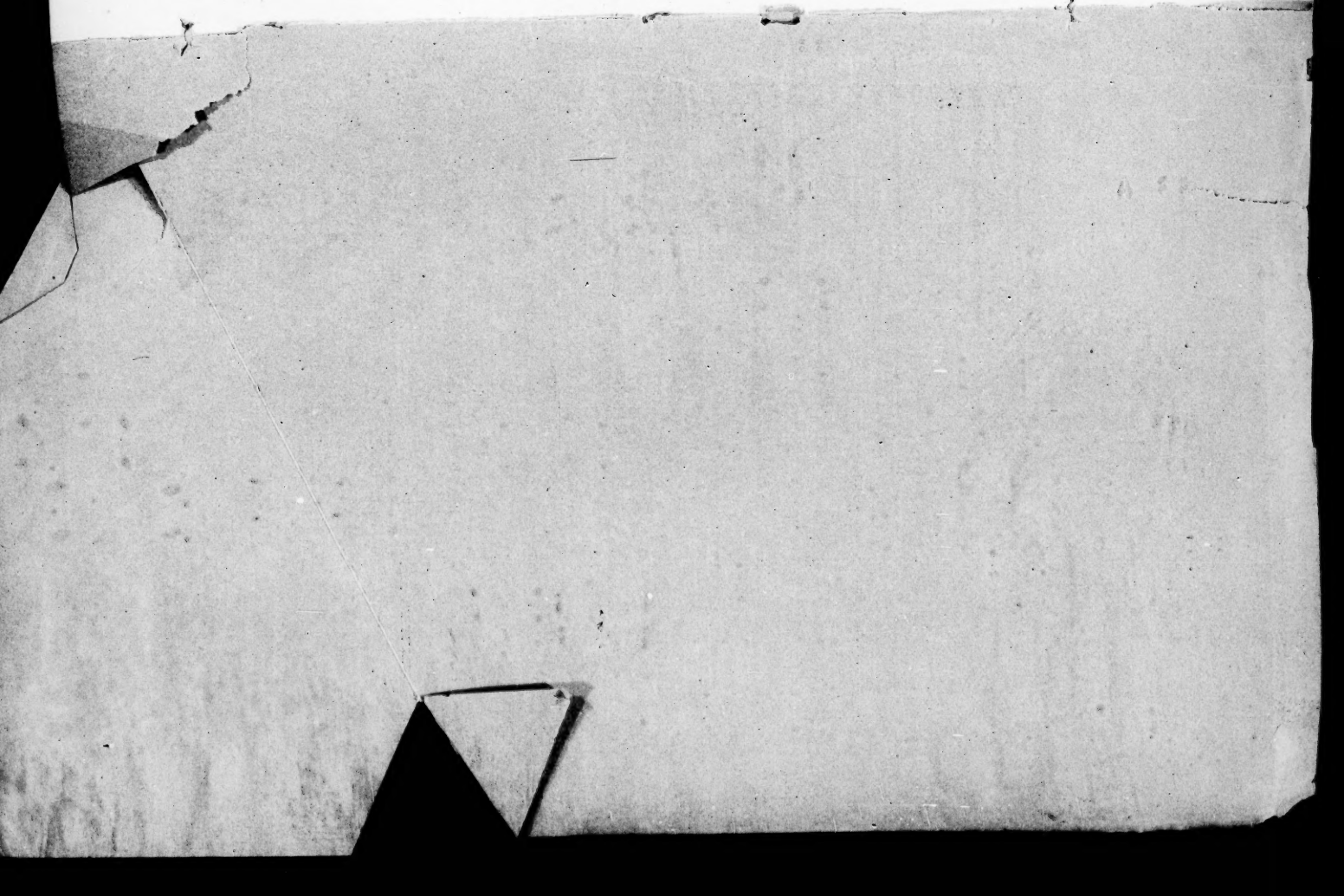
THE COUNTY COURT OF LINCOLN COUNTY AND THE JUDGES THEREOF, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES EX REL. VESPASIAN WARNER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED SEPTEMBER 30, 1879.



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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you, at the March term, 1879, thereof, between the United States ex rel. Vespasian Warner, relator, and against the County Court of Lincoln County and the judges thereof, respondents, a manifest error hath happened, to the great damage of the said respondents, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 14th day of June, in the year of our Lord one thousand eight hundred and seventy-nine.

Issued at office, in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.] M. M. PRICE.
Clerk Circuit Court United States, Eastern District of Missouri,
By A. P. SELBY, *Deputy.*

Allowed by—

A. KREKEL, *Judge.*

2 *Return to writ.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly-certified transcript of the *the* record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office, in the city of St. Louis, this 28th day of July, A. D. 1879.

[SEAL.] M. M. PRICE,
Clerk of said Court,
By A. P. SELBY, *D. C.*

(Indorsed:) No. 1089. United States circuit court, eastern district of Missouri. U. S. ex rel. Vespasian Warner, vs. The County Court of Lincoln County & the judges thereof. Writ of error to the circuit court of the United States, east. dist. of Missouri. Returned and filed 14 day of June, 1879. M. M. Price, clerk.

A copy of the within writ of error for relator lodged in this office June 14, 1879.

M. M. PRICE, *Clerk*,
By A. P. SELBY, *Deputy*.

3 The United States of America to Vespasian Warner, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein the County Court of Lincoln County and the judges thereof are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Arnold Krekel, judge of the circuit court of the United States for the eastern district of Missouri, this 21st day of June, in the year of our Lord one thousand eight hundred and seventy-nine.

A. KREKEL,
Judge United States Circuit Court, Eastern District of Missouri.

Service of citation acknowledge' this 23d day of June, 1879.

JOHN H. OVERALL,
Att'y for Pl'ffs.

4 (Indorsed:) 1089. United States circuit court, east. district of Missouri. U. S. ex rel. Vespasian Warner vs. County Court of Lincoln County and the judges thereof. Citation. Filed June 21, 1879. M. M. Price, clerk.

5 The United States of America to Vespasian Warner, relator, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein the County Court of Lincoln County and the judges thereof are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, this the 4th of August, A. D. 1879.

SAM. F. MILLER,
Judge Sup. Court.

Service of this citation acknowledged Aug. 9, '79.

OVERALL & JUDSON,
Att'ys for Pl'ff.

(Indorsed:) 1089. Filed Aug. 9, 1879. M. M. Price, clerk, by A. P. Selby, D. C.

6 In the circuit court of the United States for the eastern district of Missouri.

Be it remembered that heretofore, to wit, on the 2nd day of December, 1878, there was filed in said court a certain petition, which is in words and figures as follows, to wit:

Petition for mandamus.

In the circuit court of the United States for the eastern district of Missouri.

VESPASIAN WARNER, PLAINTIFF,
vs.
LINCOLN COUNTY, DEFENDANT.

The plaintiff, your petitioner, now comes and shows to this court that on the 27th of September, 1878, it being a day of the September term of this court, he obtained a judgment therein against Lincoln County, in the State of Missouri, for six thousand three hundred and seventy dollars and fifty-six cents, to bear interest at six per cent. per annum, and also for his costs of suit; that said judgment was obtained on certain obligations issued by said county, known as interest coupons, detached from certain bonds issued by said county of Lincoln, whereby said county acknowledged itself indebted to and promised to pay the St. Louis and Keokuk Railroad Company, or bearer, the sum of five hundred dollars by each of said bonds, and also promised to pay to bearer the coupons attached thereto, the said bonds being specifically described, numbered, and set forth in the petition on which said judgment was rendered as aforesaid.

The said bonds and coupons were issued, negotiated, and delivered to said railroad company as aforesaid, pursuant to an order of
7 the county court of said county for that purpose, and authorized by an act of the general assembly of Missouri entitled "An act to incorporate the St. Louis and Keokuk Railroad Company," approved February 15, 1857.

Plaintiff further states that under and by authority of the laws of the State of Missouri and the provisions of said act incorporating said railroad company it is the duty of the county court of said defendant county, to cause the payment of said coupons on the maturity by the levy and collection of taxes sufficient for that purpose upon the taxable property of said county, and that it is now the duty of said county court to cause to be drawn in due form of law, and delivered to plaintiff, a warrant or order ordering and commanding the treasurer of said county to pay the amount of said judgment, interest, and costs out of the treasury of said county; that it is the further duty of said county court, in case there be not sufficient funds in said treasury to pay said judgment, to cause a tax to be levied and collected on the taxable property of said county forthwith, and from the proceeds thereof to pay said judgment, interest, and costs.

The plaintiff further states that the county treasurer of Lincoln County now has in his hands as such treasurer a sum of money amounting to thirty-three thousand & twenty-nine dollars ($33,029.00), and which is the proceeds of taxes heretofore levied and collected under the authority of the county court of said county for the purpose of paying the coupons on said bonds on which plaintiff's judgment is rendered as

aforesaid, and that plaintiff is entitled to the payment of his said judgment out of said funds.

8 The plaintiff further states that he made a written demand of the County Court of Lincoln County, and of H. T. Mudd, Horatio N. Prescott, and N. D. Trescott, justices of the County Court of said Lincoln County, when said county court was in session and holding a general term of said county court, and demanded of said court and the judges thereof that they cause to be issued and delivered to plaintiff a warrant on the treasury of said county whereby said treasurer should be directed, ordered, and required to pay to plaintiff the amount of said judgment, interest, and costs of suit, and in case there be not sufficient money in the treasury to fully pay off and discharge said warrant when so drawn, that said court and the justices thereof forthwith proceed to levy and cause to be collected, in the manner provided by law in such cases, a sum of money sufficient to pay off and discharge said warrant; and that said county court and the justices thereof forthwith rescind and repeal any order or resolution heretofore made by said county court restraining or attempting to restrain the treasurer of said county from the payment of said judgment or payment of maturing coupons detached from the bonds named and described in plaintiff's petition, and on which said judgment was obtained.

The plaintiff further states that attached to said demand was a copy of the bill of costs accrued in said case, and a copy of the judgment in said case, duly certified by the clerk of this court, and under the seal thereof; that said demand contained a notification to said court and to the judges thereof that in case they refused to comply with plaintiff's demand as set forth in said notice and demand, plaintiff

9 would, on the 25th day of November 1878, or as soon thereafter as a hearing could be had, apply to this honorable circuit court of the United States for the eastern district of Missouri, at St. Louis, Missouri, for a peremptory writ of mandamus whereby said court would be commanded and required to comply with said legal and reasonable demands as set forth in said notice; said notice and demand also set forth said judgment and obligations on which the same was obtained, was duly verified by affidavit, and that a copy thereof, together with a certified copy of the bill of costs in said judgment, was delivered to said county court, and to H. T. Mudd, Horatio M. Baskett, and M. D. Trescott, justices thereof, in the town of Troy, in said Lincoln County, while said county court was in session; that said county court and the justices thereof refused payment of said judgment, or any part thereof, and also refused to issue and deliver, or cause to be issued and delivered, to the plaintiff a warrant on the county treasurer in payment of said judgment, and refused to order said county treasurer to pay said judgment out of any funds in his hands heretofore levied, assessed, and collected for the payment of the coupons on which judgment was obtained; that said county has no property subject to execution upon which plaintiff can levy for the satisfaction of said judgment, and that in consequence of said refusal and neglect of said county court to levy said taxes, and to cause the same to be collected, and to order said county treasurer to pay to said plaintiff, on said judgment, funds in his hands collected for said pur-

10 pose, your petitioner is without adequate remedy at law to obtain payment of said judgment, or any part thereof, and no part of said judgment has been paid to him, but that the whole of it, including interest and costs to date, is still due and owing to him. Wherefore plaintiff now comes and prays this court that a peremptory writ

of mandamus issue from this court, directed to the County Court of Lincoln County, and to H. T. Mudd, Horatio N. Prescott, and N. D. Trescott, justices thereof, commanding to make and deliver, or cause to be made and delivered, to plaintiff an order or warrant on the county treasurer of said county directing said county treasurer forthwith to pay said judgment out of any funds now held by him which have been heretofore collected for the payment of said coupons issued to said railroad company; and if there be not enough in the treasury subject to the payment of said judgment to fully discharge the same, he prays this court to issue its writ of mandamus against said county court and aforesaid justices thereof, commanding them to levy collect upon the taxable property subject to taxation for the purpose in said county of Lincoln, as required by law, a sufficient tax for the purpose of paying and discharging the remainder of said judgment, interest, and costs.

VESPASIAN WARNER,
By BROADHEAD & OVERALL,
His Attorneys.

J. H. Overall, one of the attorn*ies* for plaintiff, on his oath, says that the facts stated in the foregoing petition are true.

JOHN H. OVERALL.

Subscribed & sworn to before me this 30th day of November, A. D. 1878; commission expires February 17th, 1882.

11 Witness my hand & official seal, at office, in the *the* city of St. Louis.

[SEAL.]

SAM'L M. TUTT,
Notary Public, City of St. Louis, Mo.

12 And the notice and demand, judgment, and abstract of costs mentioned in said petition for a mandamus are in the words and figures following, to wit:

In the circuit court of the United States for the eastern district of Missouri.

VESPASIAN WARNER, PLAINTIFF,
vs.
LINCOLN COUNTY, DEFENDANT.

To the County Court of Lincoln County, H. T. Mudd, Horatio N. Baskett, & N. D. Trescott, judges of the County Court of Lincoln County, in the State of Missouri, now in session and holding a general term of the county court of said county:

This is to notify you that the plaintiff, Vespasian Warner, on the 27th day of September, A. D. 1878, obtained in the circuit court of the United States for the eastern district of Missouri a judgment,
13 which is entered upon the records of said court, against the said county of Lincoln, for the sum of ($6,370.56) six thousand three hundred and seventy and fifty-six one-hundredth dollars, to bear interest at the rate of six per cent. per annum, and for costs of suit.

The said judgment was rendered for and on account of certain installments of interest evidenced by matured coupons detached from certain bonds heretofore made, executed, negotiated, and delivered by the County Court of said Lincoln County, whereby said county acknowledged itself indebted & promised to pay to the St. Louis & Keokuk Rail-

road Company, or bearer, the sum of five hundred dollars, by each of said bonds, and also promised to pay to bearer the coupons attached thereto, the said bonds being specifically described, numbered, and set forth in the petition on which said judgment was rendered as aforesaid. He says said bonds and coupons were issued and negoti-
14 ated as aforesaid pursuant to an order of the county court of said county for that purpose, and by authority of an act of the general assembly of the State of Missouri entitled "An act to incorporate the St. Louis and Keokuk Railroad Company," approved Feb'y 16th, 1857. And he says that said county having failed to pay at maturity, or any time subsequent thereto, the coupons matured and due on said bonds, he caused suit to be instituted thereon in the circuit court of the United States aforesaid, and the aforesaid judgment was obtained in his favor against said county, a copy of which judgment, duly certified by clerk of said circuit court of the United States, under the seal of said court, is hereto attached.

The said plaintiff further says that under and by the laws of the State of Missouri, and under the provisions of the said act authorizing the incorporation of said railroad company, it was the duty of said county court of said defendant county to cause payment of said
15 coupons on maturity thereof by the levy and collection of taxes sufficient for that purpose upon the taxable property of said county, and it is now the duty of this court to cause to be drawn in due form of law and delivered to him a warrant ordering and commanding the treasurer of said county to pay the amount of said judgment, interest, and costs out of the treasury of said county; and in case there be not sufficient funds in said treasury to pay the same, it is the duty of said court to cause a tax as aforesaid to be levied and collected forthwith, & from the proceeds thereof that said judgment and costs be immediately paid. Plaintiff says he is advised and believes, and charges the fact to be, that the county treasurer of Lincoln County now has in his hands as such treasurer a sum of money amply sufficient to pay the judgment and costs aforesaid of this plaintiff, which sum is the proceeds of taxes heretofore levied and collected under authority of the county court of said county for the purpose of paying the
16 coupons on said bonds, and on which plaintiff's judgment is rendered as aforesaid, and to which the plaintiff is now entitled in payment of his said judgment.

Plaintiff says he has already demanded payment of said judgment and costs of the treasurer of said county, and he refuses payment thereof, and plaintiff is advised that said treasurer refused payment of the coupons on which said judgment is rendered, and now refuses payment of the judgment itself, in consequence of an illegal order of this court forbidding such payment by him. And plaintiff now comes in this court and demands of the court and the judges thereof that they cause to be issued and delivered to him forthwith a warrant on the treasury of said county whereby said treasurer shall be directed, ordered, and required to pay him the amount of said judgment, interest, and costs of suit; and in case there be not sufficient money
17 in the treasury to fully pay off and discharge said warrant when so drawn he demands of said court, and each and all of the judges thereof, that they will forthwith proceed to levy and cause to be collected in the manner provided by law in such cases a sum sufficient pay and fully discharge said warrant. And he further demands of said court and the judges thereof that they forthwith rescind and repeal any order, ordinance, or resolution heretofore made by the county court

of said county restraining or attempting to restrain or forbid the treasurer of said county from the payment of the judgment of this plaintiff or the payment of matured coupons detached from the bonds named and described in plaintiff's petition heretofore filed in the said circuit court of the United States, and on which the said judgment of this plaintiff was obtained.

And plaintiff hereby notifies said county court and the judges thereof that in case of refusal by them to comply with his demands as
18 hereinbefore set forth he will, on the twenty-fifth day of November, 1878, or as soon thereafter as a hearing can be had, apply to the circuit court of the United States for the eastern district of Missouri, at St. Louis, Missouri, for a peremptory writ of mandamus whereby they will be commanded and required to comply with his legal and reasonable demands as hereinbefore set forth.

VESPASIAN WARNER.
By OVERALL AND JUDSON,
His Attorneys.

John H. Overall, one of the above-named attorneys for Vespasian Warner, the plaintiff therein, on his oath, says he has personal knowledge of the matters and things stated in this notice and demand, and they are true.

JOHN H. OVERALL.

Subscribed and sworn to before me this the 11th day of November, 1878. Witness my hand and official seal. Duly commissioned
19 & qualified for a term expiring Feb'y 17th, 1882.

[SEAL.] SAM'L M. TUTT,
Notary Public, City of St. Louis, Mo.

John H. Overall, on his oath, says that he served the within notice and demand on the County Court of Lincoln County and the justices thereof, by reading said notice and demand to said court and to said H. T. Mudd, Horatio N. Baskett, and N. D. Trescott, and by delivering to said court and to said H. T. Mudd, Horatio N. Baskett, and N. D. Trescott a copy of said demand and notice, when the said court was in regular session in the town of Troy, Lincoln County, Missouri, on the 12th day of November, 1878.

JOHN H. OVERALL.

Subscribed and sworn to before me this 16th day of November, 1878, at office in Columbia, Mo.

[SEAL.] G. B. ROLLINS,
Notary Public.

Copy of judgment attached to notice.

20 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States in and for said district.

Be it remembered that on September 27th, 1878, at the regular September term of the circuit court of the United States for the eastern district of Missouri, the following among other proceedings were had of record, to wit:

VESPASIAN WARNER, PLAINTIFF, *vs.* LINCOLN COUNTY, DEFENDANT. } 1089.

Now again come the said parties, by their attorneys, the plaintiff by Messrs. Overall and Broadhead, and the defendant by Henry A. Cunningham, esquire, and by leave of court said defendant, by its attorney, amends its answer filed herein June 8th, 1878, to plaintiff's amended petition, by certain interlineations; and thereupon plaintiff files replication to 2nd, 3rd, and 4th defenses of said answer and demurrer
21 to the 5th and 6th defenses thereof. Defendant, by consent, then withdraws all of said amended answer to plaintiff's amended petition except the 5th and 6th defenses therein; and thereupon plaintiff withdraws his replication, this day filed, to said 2nd, 3rd, and 4th defenses of said answer. And this cause being now submitted to the court for final hearing upon the demurrer of plaintiff to the 5th and 6th defenses of defendant's answer as amended, and the court having fully considered the same, and being fully advised thereof, is of opinion that the law upon said demurrer is for the plaintiff, and it is ordered that said demurrer be sustained; and, defendant declining to further plead herein, the court finds that the plaintiff has sustained damages by reason of the non-payment of the coupons for interest on bonds issued by said defendant, and described in said petition, in the sum of six thousand three hundred and seventy dollars and fifty-six cents ($6,370.56).

22 It is therefore considered by the court that the plaintiff, Vespasian Warner, have and recover of said defendant, Lincoln County, as well the said sum of six thousand three hundred and seventy dollars and fifty-six cents, the damages aforesaid by the court assessed, as also the costs herein laid out and expended, and have thereof execution.

United States circuit court, eastern district of Missouri.

VESPASIAN WARNER *versus* LINCOLN COUNTY. }

ABSTRACT OF COSTS.

Attorney's fees, Broadhead & Overall	10 00
Marshal, H. W. Leffingwell	
Clerk, M. M. Price	173 48
" W. A. Woodson	24 75
	$208 23

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do certify that the writing
23 hereto attached to be true copies of the judgment and abstract of costs in case No. 1089, of Vespasian Warner, plaintiff, against Lincoln County, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal

of said court, at office, in the city of St. Louis, in said district, this 6th day of November, in the year of our Lord eighteen hundred and seventy-eight.

[SEAL.] (Signed) M. M. PRICE,
Clerk of said Court,
By T. L. CRAWFORD, *Deputy.*

24 And on said 2d day of December, 1878, it being an adjourned day of the September term, 1878, of said court, the following proceedings were had in said case, to wit:

Order for writ of alternative mandamus.

UNITED STATES EX REL. VESPASIAN WARNER, relator,
vs.
COUNTY COURT OF LINCOLN COUNTY AND THE justices thereof, respondents.

Now comes the relator, by his attorneys, Messrs. Broadhead and Overall, and files a petition for a peremptory writ of mandamus against said respondents requiring them to cause the treasurer of said county forthwith to pay on the judgment heretofore rendered against said county, and in favor of said relator, the amount of money now held by him, which has been heretofore collected for the payment of interest coupons on bonds issued to the St. Louis and Keokuk Railroad Company, and that for the payment of any balance remaining due and unpaid on said judgment they forthwith levy and cause to be collected, in the same manner as county taxes are collected, a special tax on all the property of said county of Lincoln, in accordance with the valuation last made by the county assessor of said county for county purposes, to satisfy said judgment for the sum of six thousand three hundred and seventy dollars and fifty-six cents, with interest and costs. And said petition having been submitted to the court, on consideration thereof it is ordered that the application for a peremptory writ of mandamus be, and the same is hereby, denied, and that an alternative writ of mandamus, returnable to the next term of this court, be issued, directed to said County Court of Lincoln County and the justices thereof,
25 commanding them to cause the treasurer of said county forthwith to pay on said judgment the amount of money now held by him which has been heretofore collected for the payment of interest coupons on bonds issued to said railroad company, and that for the payment of any balance remaining due and unpaid on said judgment they forthwith levy and cause to be collected, in the same manner as county taxes are collected, a special tax on all the property in said county of Lincoln, in accordance with the valuation last made by the county assessor of said county for county purposes, and that they apply the same when collected to the payment thereof, or that they show cause before this court, on the first day of the next term thereof, to be begun and held on the third Monday of March, 1879, why they refuse so to do.

And afterwards, on the 12th day of December, 1878, an alternative writ of mandamus was issued herein, which is in words and figures following, to wit:

Alternative writ of mandamus.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

The President of the United States of America to the County Court of Lincoln County and the justices thereof, greeting:

Whereas it has been suggested to our circuit court of the United States for the eastern district of Missouri that Vespasian Warner, the relator, is a citizen of the State of Illinois; that Lincoln County is a county of the State of Missouri, whose financial affairs are managed by a county court consisting of justices who are also citizens of said State; that on the 27th day of September, 1878, it being a day of the September term of this court, said relator obtained a judgment therein against Lincoln County, in the State of Missouri, for six thousand three hundred and seventy dollars and fifty-six cents, to bear interest at six per cent.
26 per annum, and also for his costs of suit; that said judgment was obtained on certain obligations issued by said county known as interest coupons detached from certain bonds issued by said county of Lincoln, whereby said county acknowledged itself indebted to and promised to pay to the St. Louis and Keokuk Railroad Company, or bearer, the sum of five hundred dollars by each of said bonds, and also promised to pay to bearer the coupons attached thereto, the said bonds being specifically described, numbered, and set forth in the petition on which said judgment was rendered as aforesaid; that said bonds and coupons were issued, negotiated, and delivered to said railroad company as aforesaid pursuant to an order of the county court of said county for that purpose, and by authority of an act of the general assembly of the State of Missouri entitled "An act to incorporate the St. Louis and Keokuk Railroad Company," approved February 15, 1857; that under and by authority of the laws of the State of Missouri, and the provisions of said act incorporating said railroad company, it is the duty of the county court of said county to cause the payment of said coupons on the maturity thereof, by the levy and collection of taxes sufficient for that purpose upon the taxable property of said county, and that it is now the duty of said county court, to cause to be drawn in due form of law, and delivered to relator, a warrant or order ordering and commanding the treasurer of said county to pay the amount of said judgment, interest, and costs out of the treasury of said county; that it is the further duty of said county court, in case there be not sufficient funds in said treasury to pay said judgment, to cause a tax to be levied and collected on the taxable property of said county forthwith, and from the proceeds thereof to pay said judgment, interest, and costs; that the county treasurer of Lincoln County now has in his hands as such treasurer a sum of money amounting to thirty-three thousand and twenty-nine dollars ($33,029.00), and which is the proceeds of taxes heretofore levied and collected under
27 the authority of the county court of said county for the purpose of paying the coupons on said bonds on which relator's judgment is rendered as aforesaid, and that relator is entitled to the payment of his said judgment out of said funds; that he has demanded payment of said judgment, interest, and costs of the treasurer of said county, and he refuses payment thereof, and that said treasurer refused payment of the coupons on which said judgment was rendered, and now refuses payment of the judgment itself; that he made a written demand of the County Court of Lincoln County, and H. T. Mudd, Horatio N. Baskett, and N. D. Trescott, justices of the County Court of said Lincoln County,

when said county court was in session and holding a general term of said county court, and demanded of said court and the judges thereof that they cause to be issued and delivered to relator a warrant on the treasurer of said county whereby said treasurer should be directed, ordered, and required to pay to relator the amount of said judgment, interest, and costs of suit, and in case there be not sufficient money in the treasury to fully pay off and discharge said warrant when so drawn that said court and the justices thereof forthwith proceed to levy and cause to be collected, in the manner provided by law in such cases, a sum of money sufficient to pay off and discharge said warrant, and that said county court and the justices thereof forthwith rescind and repeal any order or resolution heretofore made by said county court restraining or attempting to restain the treasurer of said county from the payment of said judgment, or payment of maturing coupons detached from the bonds named and described in relator's petition, and on which said judgment was obtained; that attached to said judgment was a copy of the bill of costs accrued in said case, and a copy of the judgment in said case, duly certified by the clerk of this court, and under the seal thereof; that said demand contained a notification to said court
28 and to the judges thereof that in case they refused to comply with relator's demand as set forth in said notice and demand, relator would, on the 25th day of November, 1878, or as soon thereafter as a hearing could be had, apply to this honorable circuit court of the United States for the eastern district of Missouri, at St. Louis, Missouri, for a peremptory writ of mandamus whereby said court would be commanded and required to comply with said legal and reasonable demand as set forth in said notice; that said notice and demand also set forth said judgment and obligations on which the same was obtained, was duly verified by affidavit, and that a copy thereof, together with a certified copy of the bill of costs in said judgment, was delivered to said county court, and to H. T. Mudd, Horatio N. Basket, and N. D. Trescott, justices thereof, in the town of Troy, in said Lincoln County, while said county court was in session; that said county court and the justices thereof refused payment of said judgment, or any part thereof, and also refuse to issue and deliver, or cause to be issued and delivered, to the relator, a warrant on the county treasurer in payment of said judgment, and refuse to order said county treasurer to pay said judgment out of any funds in his hands heretofore levied, assessed, and collected for the payment of the coupons on which said judgment was obtained; that said county has no property subject to execution upon which relator can levy for the satisfaction of said judgment, and that, in consequence of said refusal and neglect of said county court to levy said taxes, and to cause the same to be collected, and to order said county treasurer to pay to said relator, on said judgment, funds in his hands collected for said purpose, said relator is without adequate remedy at law to obtain payment of said judgment, or any part thereof, and no part of said judgment has been paid to him, but that the whole
29 of it, including interest and costs to date, is still due and owing to him:

Now, we being willing that due and speedy justice be done in the premises, do command you, the County Court of Lincoln County and the justices thereof, and each one of you, that you forthwith make and deliver, or cause to be made and delivered, to the said relator, an order or warrant on the county treasurer of said county directing said county treasurer forthwith to pay said judgment out of any funds now held by him which have been heretofore collected for the payment of said cou-

pons issued to said railroad company, and if there be not enough money in the treasury subject to the payment of said judgment to fully discharge the same, and for the payment of any balance remaining due upon said judgment, you forthwith proceed to levy and cause to be collected a special tax upon all the taxable property subject to taxation in said county of Lincoln in an amount sufficient to pay and discharge such judgment, with interest and costs, or that you show cause before this court, on the first day of the next term thereof, to be begun and held in the city of St. Louis, in the State of Missouri, on the third Monday in March, 1879, why you refuse so to do.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twelfth day of December, A. D. eighteen hundred and seventy-eight. Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] M. M. PRICE, *Clerk*,
By T. L. CRAWFORD, *D. C.*

Marshal's return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

30 I have executed this writ by delivering an original thereof to each of the following named justices, composing the within-named County Court of Lincoln County, viz: Charles W. Porter, G. G. Wilson, and Beverly Harvey, in Lincoln County, in said district, on the 11th day of February, 1879. Said service was made on said Charles W. Porter and G. G. Wilson while they were in session as such county court, and on said Beverly Harvey at his place of abode, he being then ill and unable to attend said court.

H. W. LEFFINGWELL,
U. S. Marshal, E. D. Mo.,
By O. K. WHEELER, *Deputy.*

And afterwards, on the 10th day of April, 1879, the said respondents filed their return to said writ, which is as follows, to wit:

31 *Return.*

In the circuit court of the United States for the eastern district of of Missouri, March term, 1879.

THE UNITED STATES OF AMERICA EX REL. Vespasian Warner, *vs.* THE COUNTY COURT OF COUNTY AND the justices thereof, respondents.

To the honorable circuit court of the United States for the eastern district of Missouri.

Now come the County Court of Lincoln County, and Charles W. Porter, and Gion G. Wilson, judges of the County Court of Lincoln County, and Beverly B. Harvey, who were on the 5th of November, 1878, elected judges of the County Court of County, in the state of Missouri, who were on the day of , 187 , commissioned as such judges, and who, on the day of , 1879, duly qualified as

such judges, and before whom, while sitting as a county court within that part of the territory of the State of Missouri usually designated as County, came an officer of this court, who delivered to the said Charles W. Porter and Gion G. Wilson the writ entitled alternative writ of mandamus, herewith returned with respondents' reasons for refusing to obey the commands of said writ. Respondents aver that the County Court of Lincoln County is, and has ever been, composed of three members, styled, since 1879, judges of the county court, and that respondents are not justices of said court.

Respondents aver that they were not parties to the proceeding described by relator in said writ wherein it is alleged that a judgment was rendered against Lincoln County for the sum of ; that Henry T. Mudd, H. N. Baskett, and N. D. Trescott, at said date and until January 1st, 1879, were acting judges of the county court of said county, that respondents and Beverly B. Harvey have been since January 1st, 1879, judges of the County Court of Lincoln County; that they know only by hearsay that service of the notices and demands set forth in said writ were made upon said Henry T. Mudd, H. N. Baskett, and N. D. Trescott, then acting as a county court of said county; that excepting said writ herewith returned no demand or notice of any kind of or for relator's claims as set forth in said writ has been served upon the said Charles W. Porter and Gion G. Wilson.

Respondents aver that they are credibly informed, and assert the fact to be, that the County Court of Lincoln County did, on the 13 day of August, 1868, make and enter upon its records an order substantially appropriating three hundred thousand dollars to aid in the
32 construction of the St. Louis & Keokuk Railroad Company, upon certain conditions precedent in said order set forth, and believe that it is true as shown by the record of said cause of Vespasian Warner against Lincoln County, wherein the judgment described in said writ was obtained, shows that the said judgment was obtained upon interest coupons detached from bonds a great number of which were numbered above 311, and which, excepting numbers, were all in words and figures, as follows:

No .] UNITED STATES OF AMERICA. [$500.

The county of Lincoln, in the State of Missouri, hereby agrees to pay to the St. Louis & Keokuk Railroad Company, or bearer, the sum of five hundred dollars, in ten years from the first of July, 1870, with the interest at the rate of ten per cent. per annum, payable semi-annually, on the first days of Jan'y and July in each year, at the National Bank of the State of Missouri, in St. Louis, Mo., on presentation and surrender of the proper annexed coupon. This bond is issued under the authority of an act of the general assembly of the State of Missouri entitled an "Act to incorporate the St. Louis & Keokuk Railroad Company," approved February 16, 1857, and in pursuance of an order of the county court of said county, dated August 13th, 1868, to subscribe three hundred thousand dollars to aid in the construction of the St. Louis & Keokuk Railroad, and in further accordance with an amendment to said order dated June 21, 1870. This bond shall be countersigned by the agent of said county before the delivery thereof. For the payment of this bond the faith and credit of Lincoln County is irrevocably pledged.

In testimony whereof the president of said county court has hereto subscribed his name, and the same is attested by the clerk of said court,

and the seal of said court affixed hereto, this twenty-first day of June, 1870.

(SEAL OF LINCOLN)
(COUNTY COURT.)

LEVI BICKEL,
Presiding Judge Lincoln County Court, Missouri.

Attest:
F. C. CAKE, *Clerk.*

That each of said bonds (600 in all) numbered above 311 was countersigned by county agents, and delivered after March 30, 1872, and has never been registered in office of state auditor of the State of Missouri.

That it was by plaintiff admitted upon the record in said cause, and is true, that said bonds from which the coupons sued on were detached were issued by the County Court of Lincoln County on or after the 21st of June, 1870.

Respondents aver that it is true, and that it was admitted by plaintiff upon the record in said cause of Vespasian Warner against Lincoln County, described in relator's writ, that the corporators named in the act of the general assembly of the State of Missouri entitled "An act to incorporate the St. Louis & Keokuk Railroad Company," approved February 16, 1857, did not accept the terms of said act, or thereunder organized prior to the first day of May, 1866; that it is true, and was so admitted upon the record by plaintiff in the aforesaid cause, that no subscription to the capital stock of said St. Louis & Keokuk Railroad Company was made by the County Court of Lincoln County, or by said Lincoln County, prior to August 13th, 1868.

Respondents aver that it is true, and that it was admitted upon the record of said cause by plaintiff, that at no time on or subsequent to the 16th of February, 1857 (that being the real date of approval of the act of the general assembly of the State of Missouri entitled "An act to incorporate the St. Louis & Keokuk Railroad Company"), or at the dates of the issue, or after or prior to June 21, 1870, by said county court of said pretended bonds, did the county court of Lincoln County cause any election to be held in said county to ascertain the sense of the tax-payers of said county as to any subscription to the capital stock of the St. Louis & Keokuk Railroad Company, or to ascertain the sense of said tax-payers as to whether any such subscription should be paid by issues of county bonds or by taxation, or for or against paying any such subscription by direct taxation; that at no time, at any election ever held in Lincoln County, have a majority of or any of the resident voters of said county voted in favor of any subscription by said county, or by the county court of said county, to the capital stock of the said St. Louis & Keokuk Railroad Company; that at no general or special election ever held therein have two-thirds of the qualified voters of Lincoln County ever assented to any subscription of capital stock by or any loan of the credit of said Lincoln County to said St. Louis & Keokuk Railroad Company, or to any subsequent acts of the County Court of Lincoln County accepting or in anywise recognizing said pretended corporation, or in ratifying any pretended subscription of stock, issue of bonds, or other pretended orders or acts of any County Court of Lincoln County.

Respondents aver that the general assembly of the State of Missouri, on the 23d of November, A. D., 1857, by section 2 of an act entitled "An act to expedite the sale of county bonds and the collection of railroad subscriptions," which act has never been revised or repealed, and which is therefore still in force, made it

33

unlawful for any county court thereafter to subscribe to the capital stock of any railroad company without first causing a poll to be opened at the election precincts in said county to take the sense of the tax-payers of the same for and against paying said subscription by direct taxation.

Respondents moreover aver that by an act of the general assembly of the State of Missouri approved January 14, 1861, entitled "An act supplemental to an act entitled 'An act to authorize the formation of railroad companies,' approved December 13, 1855," it was declared that it shall not be lawful for the county court of any county to subscribe to the capital stock of any railroad company unless the same shall have been voted for by a majority of the resident voters of said county at an election therein ordered and held, and that said law still is in force in this State.

Respondents aver that the aforesaid bonds and coupons upon which was predicated the judgment against Lincoln County in relator's writ described were wrongfully and unlawfully issued by pretended agents of said county, without in any manner obtaining the assent of the tax-payers then residing in said county, or any of the qualified or resident voters of said county, and that all of the property in Lincoln County subject to taxation, and upon which respondents are by said writ ordered to levy taxes, is still owned by said tax-payers or their legal representatives, comprising several thousand citizens of the State of Missouri, none of whom was a party to or is bound by the proceedings wherein the judgment described in relator's writ was rendered or by the contracts upon which said judgment was rendered.

Respondents aver that the county of Lincoln, wherein they act as judges of the county court, was organized and established under an act of the general assembly of the Territory of Missouri entitled "An act for establishing the county of Lincoln," approved December 14, 1818; that by the eighth section of said act it was declared that from and after the first day of January, 1819, it should be vested with all the powers, privileges, and immunities of a separate and distinct county; that the general assembly of said Territory had, prior to said date, on the 19th of January, 1816, adopted the common law of England in said Territory; that prior to the establishment of said county the Senate and House of Representatives of the United States of America had, by an organic act, approved June 4, 1812, establishing said Territory of Missouri, provided, among other privileges of the citizens of said Territory, that they should be entitled to judicial proceedings according to the common law and the laws and usages in force in said Territory, and that no man should be deprived of his property but by the judgment of his peers and the law of the land, and that if public exigencies made it necessary to take the property of any person full compensation should be made for the same; that by the constitution of the State of Missouri adopted in the year 1820 it was ordained that all laws then in force, including those hereinbefore described, not repugnant to said constitution should remain in force until they might be altered or repealed by the general assembly or expire by their own limitations.

Respondents aver that the subsequent constitutions of the State of Missouri adopted in 1865 and in 1875 contained provisions similar to that alleged to have been contained in the constitution of Missouri adopted in 1820, and that in so far as said provisions of said act of Congress in force January 1, 1819, made it unlawful to deprive any citizen of said county of Lincoln of his property except by the judg-

ment of his peers and "the law of the land" the provisions of said organic law have never been repealed by the general assembly of the said Territory of Missouri or by the general assembly of the State of Missouri, are not repugnant to and constitutional provision ever adopted in the State of Missouri, and are still in full force and effect.

Respondents aver that neither by the laws in force by the terms of the said act of the 16th of February, 1857, incorporated the St. Louis & Keokuk Railroad Company, nor at the date of the alleged subscription of stock, August 13, 1868, recited in the bonds upon which relator's judgment is based, nor at the date of the issue of said bonds by the County Court of Lincoln County, on the 21st day of June, 1870, nor at the dates of the countersignature, negotiation, or delivery of said bonds by the county agents Lincoln County, at various dates between the year 1870 and the year 1874, nor at the present time, was there, or is there now, any law in force in the State of Missouri requiring or authorizing the County Court of Lincoln County, or these respondents or judges thereof, to levy any special tax upon the taxable property of the before-mentioned citizens of Lincoln County, in the State of Missouri, for the purpose of paying the interest upon the aforesaid bonds or the judgment in said relator's writ described as having been obtained upon certain coupons, which respondents aver were for semi-annual interest upon aforesaid bonds, at the rate of ten per centum per annum. More particularly, respondents show that the twenty-ninth section of said act of the general assembly of the State entitled "An act to incorporate the St. Louis & Keokuk Railroad Company," approved February 16, 1857, was as follows:

SECTION 29. It shall be lawful for the county court of any county in which any part of the route of said railroad may be to subscribe to the stock of said company, and it may invest its funds in the stock of said company, and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends,
34 and is the pretended authority relied upon by relator for demanding the levy of taxes by respondents.

Respondents aver that under the laws of the State of Missouri in force at and prior to the date of the contracts upon which the judgment in relator's writ described is founded, the levying, assessment, and collection of all taxes by the county court and other officers of Lincoln County, in the State of Missouri, were and still are judicial proceedings, and not ministerial acts.

For further return to said alternative writ of mandamus respondents aver that the records of the County Court of Lincoln County show that the ex-treasurer of Lincoln County had on hand about the 20th of May, 1878, the sum of $33,029.78, balance of taxes for railroad purposes previously collected in said county; that said sum thus collected was assessed for the year 1876, and collected by the county court and officers then in office, for the express purpose of paying the entire amount of interest coupons due for 1877 on aforesaid bonds, and including all the coupons upon which relator's judgment was obtained.

That during the months of May, June, July, and August, 1878, the persons then acting as judges of the County Court of Lincoln County loaned $13,500.00 of said fund in the following manner, to the persons hereinafter named, for the term, and at the rate, and for the several amounts in said table set forth:

Name.	Amount loaned.	Date.	Terms of loan.
Joseph B. Allen	$500 00	May 20, 1878	Due July 18, 1879, 6 per cent.
W. T. Powell	300 00	" 20, "	" " " "
Wilford Lee	1,300 00	" 21, "	" " " "
A. H. and S. L. Holcomb	700 00	" 22, "	" " " "
M. E. Sheets	700 00	" 22, "	" " " "
S. W. Avery	500 00	" 22, "	" " " "
H. C. Clare	1,400 00	" 22, "	" " " "
C. T. Woodson	500 00	" 24, "	" " " "
Jno. W. Gunther	500 00	June 1, "	" " " "
W. D. Jameson	2,000 00	" 1, "	" " " "
Levi J. Garrett	2,000 00	" 3, "	" " " "
Joseph H. Shelton	200 00	" 8, "	" " " "
E. N. Bonfils	500 00	" 12, "	" " " "
Jacob Mosley	375 00	" 15, "	" " " "
H. P. Allen	800 00	" 18, "	" " " "
Sacob Mildenstein	500 00	" 26, "	" " " "
Mary J. Ricks et al.	500 00	July 8, "	" " " "
Isaac Whiteside	225 00	August 16, "	" " " "
	$13,500 00		

That said ex-treasurer of Lincoln County, John McDonald, has been sued upon his official bonds, at the relation of said county, for the balance of said sum, to wit, the sum of $19,529.78, with interest, which sum said ex-treasurer has failed to turn over to his successor. Respondents further show that Thos. J. Nailey, county treasurer of Lincoln County, holds in his hands the bonds of the aforesaid persons for the several sums by them borrowed from the county, and amounting in the aggregate to thirteen thousand five hundred dollars, and that each of said loans is secured by mortgage executed by the borrower upon real estate situated in said county.

Respondents aver that the fund hereinbefore described and accounted for is that fund of $33,029.00 which relator alleges to have been collected for the purpose of paying interest upon coupons upon which judgment in said writ was obtained.

Respondents aver that at the last regular quarterly assessment made by the present treasurer of Lincoln County, on the 11th of February, 1879, the following amounts were found to be due by said treasurer to the various funds hereinafter designated:

Land-redemption fund	
County-tax fund	$13,547 35
Jury fund	96 50
Public-road fund	119 97
Bridge fund	341 14
Fines and penalties fund	51 95
Fees fund	110 64
County-revenue fund	4,826 89
School fund	16,304 60
Court-house fund	95 82
Total	$35,494 96

35 Respondents aver that under the laws in the State of Missouri they can only levy taxes at the April term of said county court, or under the provisions of the act of March 8th, 1879, in May of each year; that they propose to levy one half of one per cent. for county expenses at the next term of said court upon all the property in said county subject to taxation; that said property consists of $3,069,345

of land, being 395,270 acres of land, owned by several thousand citizens of the State of Missouri, holding the title thereto in severalty, and of personal property likewise owned by various individuals, and amounting in all to $1,189,145, making the total taxable wealth in said county $4,258,490. Respondents aver that there was no law in force in the State of Missouri at the date of the execution of the obligations upon which relator's judgment is founded, or at the date of said judgment, authorizing the levy of any special taxes or the drawing of any warrant upon any special fund of said county for the purpose of paying said obligations or relator's judgment. Wherefore respondents ask to be discharged, with their costs, in this behalf incurred.

HENRY A. CUNNINGHAM,
Attorney for Respondents.

Verification of the above return waived.

OVERALL & JUDSON,
Att'ys for Relator.

And afterwards, at said March term, 1879, of said court, and on the 11th day of April, 1879, the following further proceedings were had in this case, to wit:

36 *Order as to pleadings.*

UNITED STATES EX REL. VESPASIAN WARNER, relator,
vs.
THE COUNTY COURT OF LINCOLN COUNTY AND the justices thereof, respondents.

By a stipulation this day filed it is agreed by the parties hereto that similar pleadings, both on behalf of relator and respondents, as are filed in the case of the United States ex rel. Joseph M. Douglass against The County Court of Lincoln County and the judges thereof, No. 1278, now pending here, may be taken and considered by the court as filed herein, and that a similar judgment, order, and proceedings may be had in this case as may be made and had in said case No. 1278.

37 And afterwards, at said March term, 1879, of said court, the following further proceedings were had in said case on the 19th day of April, 1879, to wit:

Peremptory writ of mandamus ordered.

UNITED STATES EX REL. VESPASIAN WARNER, relator,
vs.
COUNTY COURT OF LINCOLN COUNTY AND THE justices thereof, respondents.

Now come the parties, by their attorneys, and the court having considered the demurrer of relator to the return of respondents to the alternative writ of mandamus herein, and being fully advised in the premises, orders that said demurrer be, and the same is hereby, sustained. And it appearing to the court that the said respondents have

returned an insufficient cause why they have refused to comply with the writ of alternative mandamus heretofore issued herein against them, it is now, on motion of said relator, by his attorneys, ordered that a peremptory writ of mandamus issue herein, to be directed to the said respondents, commanding them to cause the treasurer of said county forthwith to pay on the judgment heretofore rendered herein against said county of Lincoln in favor of said relator the amount of money now held by him which has been heretofore collected for the payment of interest coupons on bonds issued by said county to the St. Louis and Keokuk Railroad Company, and that for the payment of any balance remaining due and unpaid on said judgment said respondents forthwith levy and cause to be collected, in the same manner as county taxes are collected, a special tax on all the property in said county of Lincoln, in accordance with the valuation last made by the county assessor of said county for county purposes, in an amount sufficient to pay off and satisfy said judgment, with interest thereon and costs, and that they apply the same when collected to the payment of said judgment, interest, and costs; and that they certify perfect obedience to said
38 writ to this court on the first day of the next term thereof, to be holden on the third Monday (the 15th day) of September next.

And afterwards, on the 29th day of April, 1879, a peremptory writ of mandamus was issued in said case; which is in the words and figures following, to wit:

Peremptory writ of mandamus.

UNITED STATES OF AMERICA,
Eastern District of Missouri, set:

The President of the United States of America to the County Court of Lincoln County and the judges thereof, greeting:

Whereas by a writ of alternative mandamus issued out of circuit court of the United States in and for the eastern district of Missouri, on the 12th day of December, A. D. 1878, and to you directed, you were commanded to forthwith make and deliver, or cause to be made and delivered, to Vespasian Warner, who had theretofore recovered a judgment against the said Lincoln County in our said court for the sum of six thousand three hundred and seventy & $\frac{56}{100}$ dollars, an order or warrant on the treasurer of said county directing said treasurer forthwith to pay said judgment, with interest and costs, out of any funds now held by him which have heretofore been collected for the payment of coupons detached from bonds issued by said county in payment of a subscription made by said county to the capital stock of the St. Louis and Keokuk Railroad Company, as in said writ specified, and if there be not enough money in the treasury subject to the payment of said judgment, interest, and costs, then, for the payment of any balance remaining due thereon, that you forthwith proceed to levy and cause to be collected a special tax upon all the taxable property subject to taxation in said county of Lincoln in an amount sufficient to pay and discharge said judgment, interest, and costs, or show cause why you refused so to do; and whereas at the March term, 1879,
39 of our said court, and on the 19th day of April, it was adjudged that you had certified and returned no sufficient cause why you refused to obey said writ of alternative mandamus:

Now, therefore, you, the County Court of said Lincoln County and

the judges thereof, and each and every of you, are hereby commanded forthwith to make and deliver, or cause to be made and delivered, to said Vespasian Warner, an order or warrant on the county treasurer of said county forthwith to pay said judgment, interest, and costs out of any funds now held by him which have been heretofore collected for the payment of said coupons, and if there be not enough money in the treasury subject to the payment thereof sufficient to pay off said judgment, interest, and costs, that for the payment of any balance remaining due thereon you forthwith proceed to levy and cause to be collected, at the same time that taxes are collected for State and county purposes, a special tax upon all the taxable property subject to taxation in said county of Lincoln, in an amount sufficient to fully pay and discharge said judgment, interest, and costs, and that you apply the same when collected to the payment of said judgment, interest, and costs; and that you certify due and perfect obedience of this writ to our said court on the first day of the next term thereof, to be holden on the third Monday of September, A. D. 1879.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 29th day of April, A. D. 1879. Issued at office, in the city of St. Louis, in said district, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] M. M. PRICE, *Clerk*,
By T. L. CRAWFORD, *D. C.*

Marshal's return.

40 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I have executed this writ by delivering an original thereof, being a peremptory writ of mandamus, to each of the following-named judges, composing the within-named County Court of Lincoln County, viz: Charles W. Porter, Gion G. Wilson, and Beverly B. Harvey. Said service was made on them while they were in session as said county court, at Troy, in said district, on the 12th day of May, A. D. 1879.

H. W. LEFFINGWELL,
U. S. Marshal, E. D. Mo.,
By JAMES B. GEGGIE, *Deputy.*

And afterward, on the 14th day of June, 1879, it being a day of said March term, 1879, of said court, the following further proceedings were had in said case to wit:

Writ of error allowed.

UNITED STATES EX REL. VESPASIAN WARNER, relator,
vs.
COUNTY COURT OF LINCOLN COUNTY AND THE judges thereof, respondents.

Now come the respondents, by their attorney, and present to the court a writ of error to remove this cause to the Supreme Court of the United States, which said writ of error is allowed.

And afterwards, on the 21st day of June, 1879, it being a day of said March term of said court, the following further proceedings were had in said case, to wit:

Citation signed.

UNITED STATES EX REL. VESPASIAN WARNER, relator,
vs.
COUNTY COURT OF LINCOLN COUNTY AND THE judges thereof, respondents.

Now come the said respondents, by their attorneys, and present to the court a citation citing and admonishing the said relator to be and appear at a Supreme Court of the United States at the next term thereof,
on the second Monday of October next, which said citation
41 is signed by the judge; and the said respondents also present to the court a bond in the penal sum of five hundred dollars, which bond is approved and ordered to be filed.

The said bond is in the words and figures following, to wit:

42 Know all men by these presents that we, Alexander Mudd and Jefferson Sullenger, are held and firmly bound unto Vespasian Warner in the full and just sum of five hundred dollars, to be paid to the said Vespasian Warner, his heirs, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 21st day of June, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas lately, at the March term, A. D. 1879, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between the United States of America ex rel. Vespasian Warner, relator, and the County Court of Lincoln County and the judges thereof, Charles W. Porter, Gion G. Wilson, and Beverly Harvey, respondents, judgment was rendered against the said County Court of Lincoln County and the judges thereof, respondents, and the said County Court of Lincoln County and the judges thereof having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Vespasian Warner citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now, the condition of the above obligation, is such that if the said County Court of Lincoln County and the judges thereof shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of—

ALEXANDER MUDD. [SEAL.]
JEFFERSON SULLENGER. [SEAL.]

Approved by—

A. KREKEL, *Judge.*

43 And afterwards, to wit, on the ninth day of August, A. D. 1879, the following further proceedings were had and appear of record in said cause, to wit:

U. S. EX REL. VESPASIAN WARNER, RELATOR,
vs.
COUNTY COURT OF LINCOLN COUNTY and the judges thereof, respondents. } 1089.

Now come the respondents, by their attorney, and file their bond in the penal sum of thirteen thousand dollars, upon which bond is endorsed the following: "I approve the within bond, to operate as a supersedeas. Sam. F. Miller, asso. justice Sup. Court U. S. August 4, 1879."

Ordered, that all further proceedings herein be, and the same are hereby, stayed until the final determination of this cause in the Supreme Court of the United States.

Said bond being in words and figures following, to wit:

44 Know all men by these presents that we, Charles W. Porter, G. G. Wilson, B. B. Harvey, Josiah Creech, Joseph A. Mudd, B. F. Hardesty, T. H. Admire, John M. Reid, M. T. Watts, J. M. Newland, W. E. Brown, Geo. J. Dryden, M. H. Benear, W. H. Mayes, Will. J. Dryden, W. A. Taylor, C. E. Houston, S. A. Hanell, Jacob Mildenstein, James Harlow, J. B. Cunningham, sr., O. J. Kimbrough, H. F. Massie, F. D. Hardesty, J. C. Williams, Jas. S. Terrell, W. A. Shannon, W. L. Carr, Joseph M. Dryden, E. R. Birkhead, W. Finley, George F. Sands, E. F. Hinds, J. M. Alexander, F. M. Birkhead, J. N. Norton, D. C. Dowing, H. H. Mounce, R. L. Birkhead, Salem Reid, W. H. Bartlow, David H. Mattocks, Jas. F. Norton, N. G. Norton, Welty Smith, J. H. Cock, W. Wheler, H. N. Baskett, Isaac Whiteside, Geo. N. Taylor, C. W. Ricks, W. S. Killam, J. Tiller, A. M. Shults, A. W. Shults, T. Gid. Martin, Jno. F. Miller, J. M. Graves, J. R. Thornhill, E. M. Creech, O. C. McKay, Jno. J. Alexander, Thos. Reid, Jesse Colaw, J. Sitton, Wesley Crume, J. S. Crume, W. E. Kelley, D. C. Reid, J. T. Fin-
45 ley, J. N. Pollard, W. M. Scott, Jno. Hackman, John Cockrell, Taylor Ricks, E. M. Sutton, Warren Bailey, J. A. Magruder, Wm. Eggering, M. E. Sheets, J. H. Alexander, A. S. Bailey, George Tayor, Elijah Myers, M. G. Fisher, Wm. S. Henry, J. L. Wilkinson, G. S. Brown, S. D. Barnett, T. P. Bryan, Henry T. Mudd, S. D. Cannon, A. F. Downing, Thos. R. Reid, Alexander Mudd, Johannes Schmidt, W. A. Wares, Francis M. Howell, S. H. Carter, J. R. Witt, F. M. Luckett, J. W. Wilson, R. B. Hutt, John C. Downing, Joseph Ballar, W. W. Reid, Thos. J. Nalley, James E. Eddens, James M. Houston, J. N. Ricks, Robert Mitchell, E. A. Cobb, J. D. Carr, D. F. Foley, John F. Nelson, C. A. Mayes, J. W. Vaughn, H. C. Hatfield, S. J. Blakely, William S. Luckett, G. N. Mitchell, Wm. Moore, W. H. Priest, John N. Waters, John F. Singleton, James F. Waters, H. F. Wells, John A. Grimes, W. A. K. Elsberry, G. S. Elsberry, R. T. Elsberry, A. D. Benea, Isaac Cannon, J. C. Wilkinson, T. R. Goodman, W. A. Hemphill, W. N. Gibson, U. D. Jamison, William Berkley, H. C.
46 Treavy, W. S. Stearns, V. A. Prewitt, S. Richards, T. H. Vance, Abr'm True, Wm. N. Crenshaw, B. F. Robertson, N. D. Trescott, David Allen, D. T. Killan, are held and firmly bound unto Vespasian Warner in the full and just sum of thirteen thousand dollars, to be paid to the said Vespasian Warner, his heirs, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this day of

, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas lately, at the March term, 1879, of the circuit court of the United States for the eastern district of Missouri, in a proceeding or suit depending in said court between the United States ex rel. Vespasian Warner, relator, and the County Court of Lincoln County
47 and Charles W. Porter, Guion G. Wilson, and Beverly Harvey, judges of said county court, respondents, a final judgment was rendered sustaining relator's demurrer to the amended return of said respondents to relator's alternative writ of mandamus, by which judgment respondents were adjudged to have made no sufficient return to said alternative writ of mandamus, or any sufficient showing why they had refused to obey its commands, whereby said judgment commanded forthwith to make out and deliver, or cause to be made out and delivered, to said Vespasian Warner an order or warrant on the treasurer of said Lincoln County forthwith to pay to said Vespasian Warner the amount of a judgment, in favor of said Vespasian Warner, rendered against Lincoln County at the September term, 1878, of the circuit court of the United States for the eastern district of Missouri, in case No. 1089,
48 for the amount of six thousand three hundred and seventy & $\frac{56}{100}$ dollars, together with interest and costs, out of any funds by him held and by him collected for the payment of the coupons upon which said judgment was predicated, and commanding said respondents that if there was not sufficient money in the treasury subject to the payment thereof to pay off said judgment, interest, and costs, that they should forthwith proceed to levy and cause to be collected, at the same time that taxes are collected for State and county purposes, a special tax upon all the taxable property subject to taxation in said county of Lincoln in an amount sufficient to fully pay and discharge said judgment, interest, and costs, and apply the same when collected to the payment of said judgment, interest, and
49 costs; and whereas said respondents have obtained a writ of error of the said court to reverse the judgment aforesaid against respondents rendered on the 19 of April, A. D. 1879, and a citation directed to the said Vespasian Warner citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now, the condition of the above obligation is such that if the said County Court of Lincoln County, and Charles W. Porter, Guion G. Wilson, and Beverly Harvey, judges of said county court, shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of—

NAMES.		NAMES.	
CHAS. W. PORTER.	[SEAL.]	J. B. CUNNINGHAM, Sr.	[SEAL.]
50 G. G. WILSON.	[SEAL.]	O. J. KIMBROUGH.	[SEAL.]
B. B. HARVEY.	[SEAL.]	H. F. MASSIE.	[SEAL.]
JOSIAH CREECH.	[SEAL.]	F. D. HARDESTY.	[SEAL.]
JOSEPH A. MUDD.	[SEAL.]	I. C. WILLIAMS.	[SEAL.]
B. F. HARDESTY.	[SEAL.]	JAS. S. TERRELL.	[SEAL.]
T. H. ADMIRE.	[SEAL.]	W. A. SHANNON.	[SEAL.]
JOHN M. REID.	[SEAL.]	W. L. CARR.	[SEAL.]
M. T. WATTS.	[SEAL.]	JOSEPH H. DRYDEN.	[SEAL.]
J. M. NEWLAINE.	[SEAL.]	E. R. BIRKHEAD.	[SEAL.]

W. G. BROWN. [SEAL.]
GEO. J. DRYDEN. [SEAL.]
M. H. BENEAR. [SEAL.]
W. H. MAYES. [SEAL.]
WILL. J. DRYDEN. [SEAL.]
W. A. TAYLOR. [SEAL.]
C. E. HOUSTON. [SEAL.]
S. H. HARRELL. [SEAL.]
JACOB HILDENSTEIN. [SEAL.]
JAMES HARLOW. [SEAL.]
DAVID H. MATTOCK. [SEAL.]
JAS. F. NORTON. [SEAL.]
N. S. NORTON. [SEAL.]
WELTY SMITH. [SEAL.]
J. H. COCK. [SEAL.]
W. WHELER. [SEAL.]
H. R. BASKETT. [SEAL.]
ISAAC WHITESIDE. [SEAL.]
GEO. N. TAYLOR. [SEAL.]
C. W. RICKS. [SEAL.]
51 W. S. KILLAM. [SEAL.]
J. TILLER. [SEAL.]
A. M. SHULTS. [SEAL.]
A. W. SHULTS. [SEAL.]
T. GID. MARTIN. [SEAL.]
JOHN F. MILLER. [SEAL.]
J. M. GRAVES. [SEAL.]
J. R. THORNHILL. [SEAL.]
E. M. CREECH. [SEAL.]
O. C. MCKAY. [SEAL.]
JNO. L. ALEXANDER. [SEAL.]
THOS. REID. [SEAL.]
JESSE COLAN. [SEAL.]
J. SITTON. [SEAL.]
WESLEY CRUME. [SEAL.]
J. S. CRUME. [SEAL.]
W. E. KELLENEY. [SEAL.]
D. C. REID. [SEAL.]
J. F. FINLEY. [SEAL.]
J. N. POLLAND. [SEAL.]
W. M. SCOTT. [SEAL.]
JNO. HECKMAN. [SEAL.]
W. W. REID. [SEAL.]
THOS. J. NALLEY. [SEAL.]
JAMES E. EDDENS. [SEAL.]
JAMES M. HUSTON. [SEAL.]
T. N. RICKS. [SEAL.]
ROBERT MITCHELL. [SEAL.]
E. A. COBB. [SEAL.]
52 J. D. CARR. [SEAL.]
D. F. FOLEY. [SEAL.]
JOHN F. NELSON. [SEAL.]
C. A. MAYES. [SEAL.]
G. W. VAUGHN. [SEAL.]
H. C. HATFIELD. [SEAL.]
S. J. BLAKELEY. [SEAL.]

W. FINLEY. [SEAL.]
GEORGE F. SANDS. [SEAL.]
E. F. HINDS. [SEAL.]
J. M. ALEXANDER. [SEAL.]
F. M. BIRKHEAD. [SEAL.]
J. N. NORTON. [SEAL.]
D. C. DOWNING. [SEAL.]
H. H. MOUNCE. [SEAL.]
R. S. BIRKHEAD. [SEAL.]
SALEM REID. [SEAL.]
W. H. BARTLOW. [SEAL.]
JOHN COCKRELL. [SEAL.]
TAYLOR RICKS. [SEAL.]
E. M. SUTTON. [SEAL.]
WARREN BAILEY. [SEAL.]
J. O. MAGRUDER. [SEAL.]
WM. EGGERING. [SEAL.]
M. E. SHUTS. [SEAL.]
J. H. ALEXANDER. [SEAL.]
A. A. BAILEY. [SEAL.]
JAYLO TAYOR. [SEAL.]
ELIJAH MYERS. [SEAL.]
M. G. FISHER. [SEAL.]
WM. S. HENRY. [SEAL.]
J. L. WILKINSEN. [SEAL.]
G. S. BROWN. [SEAL.]
S. D. BARNETT. [SEAL.]
T. P. BRYON. [SEAL.]
HENRY T. MUDD. [SEAL.]
S. D. CANNON. [SEAL.]
A. F. DOWNING. [SEAL.]
THO. R. REID. [SEAL.]
ALEXANDER MUDD. [SEAL.]
JOHANNES SCHMIDT. [SEAL.]
W. A. GRAVS. [SEAL.]
FRANCIS M. HOWELL. [SEAL.]
S. H. CARTER. [SEAL.]
J. P. WITT. [SEAL.]
F. M. LUCKETT. [SEAL.]
J. W. WILSON. [SEAL.]
R. B. HUTT. [SEAL.]
JOHN C. DOWING. [SEAL.]
JOSEPH B. ALLEN. [SEAL.]
W. D. JAMISON. [SEAL.]
WM. BERKLEY. [SEAL.]
H. C. TREVEY. [SEAL.]
W. S. STEVENS. [SEAL.]
V. A. PREWITT. [SEAL.]
S. RICHARDS. [SEAL.]
F. H. VANCE. [SEAL.]
ABNER TRUE. [SEAL.]
WM. N. CRENSHAW. [SEAL.]
B. F. ROBERTSON. [SEAL.]
N. D. TRESCOTT. [SEAL.]
DAVID ALLEN. [SEAL.]
D. T. KILLAM. [SEAL.]

WM. S. LUCKETT.	[SEAL.]	T. N. MITCHELL.	[SEAL.]
WM. MOORE.	[SEAL.]	W. H. PRIEST.	[SEAL.]
JOHN W. WATERS.	[SEAL.]	JOHN K. SINGLETON.	[SEAL.]
JAMES F. WATERS.	[SEAL.]	H. F. WELLS.	[SEAL.]
JOHN A. GRIMES.	[SEAL.]	W. A. K. ELSBERRY.	[SEAL.]
T. S. ELSBERRY.	[SEAL.]	R. T. ELSBERRY.	[SEAL.]
A. D. BENEAR.	[SEAL.]	ISAAC CANNON.	[SEAL.]
J. C. WILKINSON.	[SEAL.]	T. R. GOODMAN.	[SEAL.]
W. A. HEMPHILL.	[SEAL.]	W. N. GIBSON.	[SEAL.]

(Endorsed on said bond appears the following order of approval, to wit:)

I approve the within bond, to operate as a supersedeas.

August 4, 1879.

SAM. F. MILLER,
Asso. Justice Sup. Court U. S.

53 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify that the writing hereto attached to be a true copy of the record and proceedings in case No. 1089, of the United States ex. rel. Vespasian Warner, relator, against the County Court of Lincoln County and the judges thereof, respondents, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this 9th day of August, in the year of our Lord, eighteen hundred and seventy-nine.

[SEAL.]

M. M. PRICE,
Clerk of said Court,
By A. P. SELBY, *Deputy.*

54 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify that on the 14th day of June, 1879, plaintiffs in error in *in* case No. 867, of the County Court of Lincoln County and the judges thereof, plaintiffs in error, against The United States, ex. rel. Vespasian Warner, defendant in error, in above case, lodged in my office for relator, defendant in error in above case, a copy of the writ of error in said cause now on file in said cause, together with the transcript of the record in said cause, now pending in the Supreme Court of the United States.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this 9th day of December, in the year of our Lord eighteen hundred and seventy-nine.

[SEAL.]

M. M. PRICE,
Clerk of said Court,
By A. P. SELBY, *Deputy.*

(Indorsed:) Sup. Court U. S., 1879, October term. No. 867. United States Supreme Court, eastern district of Missouri, County Court

of Lincoln Co. and judges thereof, pl'ffs in error, against U. S. ex. rel. Vespasian Warner, def't in error. Duly certified copy of the clerk &c., as to the lodging of copy of writ of error for relator June 14, 1879, to be filed in conformity with stipulation in the above-entitled cause. Filed 7 February, 1880.

(Indorsement on cover:) No. 279. The County Court of Lincoln County & the judges thereof, plaintiffs in error, vs. The U. States ex. rel. Vespasian Warner. E. Missouri C. C. U. S. Filed 30th September, 1879.

SUPREME COURT U.S.
FILED
APR 10 1882

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1881.—No. 279.

THE COUNTY COURT OF LINCOLN COUNTY AND THE JUDGES THEREOF, *Plaintiffs in Error.*

vs.

THE UNITED STATES, *ex rel.* VESPARIAN WARNER, *Defendant in Error.*

The same questions arising in the two cases, this case is, by permission of court, submitted on the statement and brief filed in case of County Court of Ralls County and the Judges thereof v. United States *ex rel.* Joseph M. Douglass, No. 277 of this term.

JOHN H. OVERALL,
Attorney for Relator.

OFFICE SUPREME COURT U.S.
FILED
APR 5 1882
JAMES H. McKENNEY, CLERK

No. 279.

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

THE COUNTY COURT OF LINCOLN COUNTY, AND THE JUDGES THEREOF, *Plaintiffs in Error*,

versus

THE UNITED STATES, *ex rel.* VESPASIAN WARNER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF OF PLAINTIFFS IN ERROR.

HENRY A. CUNNINGHAM, *Attorney for Plaintiffs in Error.*

J. P. O'BRIEN & Co., Printers, 218 Market Street, St. Louis.

No. 279.

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

THE COUNTY COURT OF LINCOLN COUNTY, AND THE JUDGES THEREOF, *Plaintiffs in Error*,

versus

THE UNITED STATES, *ex rel.* VESPASIAN WARNER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT.

The printed record, page 8, shows that the judgment upon which this proceeding was founded, was simply, a general judgment rendered against Lincoln county for the sum of $6,370.56, on the 27th of September, 1878, by the circuit court of the United States, for the eastern district of Missouri. Only from the conflicting averments or admissions made in the pleadings in this proceeding can any light be obtained as to the nature of the obligations merged in this general judgment, and the facts shown by the record in the original cause. The printed record, page 13, shows the form of the bond issued thirteen years after the date of the charter, and that the judgment herein was rendered upon *ten* per cent. interest coupons detached from said bonds. The rate of interest is important because the general railroad law declared applicable by the court below only authorized *seven* per cent. interest.

It was not pretended below, and will not probably be contended here, that there is or ever has been any authority under the laws of the State of Missouri, to provide for the payment of a general judgment, against a county, ex-

cept by warrant upon the common fund for current expenses or county purposes, arising from the annual levy of a tax limited at the dates of the contracts, and of the judgment herein involved to one half of one per cent. upon property subject to taxation for state purposes with certain exemptions under laws in force when contracts were made, but not in force when judgment was rendered. Out of the surplus of said fund remaining after meeting the expenses of county government, plaintiffs in error have paid and are willing to pay all general judgments against the county, similar to that obtained by relator, but it will be noted that relator has carefully avoided asking or accepting any such provision, but has confined his prayer to demands for entirely different relief.

Since the mandamus was superseded, relator has collected by ordinary process of law, the greater part of the judgment herein involved, and as will be hereinafter shown, could have collected all in the same manner if he had not seen fit to sleep upon his rights for years and allow junior judgments to share funds more than sufficient to have paid every judgment existing against the county when this, and other judgments for peremptory writs of mandamus against the same respondents, were superseded.

The relator's petition for the writ of mandamus, his demands from and notices to the county court, were filled with defective and conflicting statements which it is believed are fatal to the entire proceeding if the common law practice prevails herein.

On the 13th of November, 1878, the circuit court of the United States for the eastern district of Missouri, made the order for mandamus set forth upon page 7, of printed record, reciting the insufficient prayer of relator and concluding that an alternative writ of mandamus be issued directed to the county court of Lincoln county, and the justices thereof, commanding them to cause the treasurer of said county forthwith to pay on the said judgment, the amount of money now held by him, which has been heretofore col-

lected for the payment of interest coupons on bonds to said railway company, and that for the payment of any balance remaining due and unpaid on said judgment, they forthwith levy and cause to be collected in the same manner as county taxes are collected, a special tax on all property in said county in accordance with the valuation last made by the county assessor of said county for county purposes, and that they apply the same when collected to the payment thereof or show cause, &c.

Twenty-nine days after the making of said order, the clerk seems to have issued the alternative writ of mandamus found upon page 8 of printed record, reciting divers and sundry facts, nowhere found by the court in the order, and in said writ merely purporting to be statements of relator. The relator is represented as suggesting that it is the duty of the said county court to pay said judgment "by causing a warrant therefor to be drawn on the treasurer of said county, and by a levy and collection of a tax on the property of said county, that said county has no property subject to execution upon which relator can levy, and that a sum of money had been previously collected by special tax by order of said court for the payment of the coupons on which judgment was obtained, and that said sum was duly placed in the hands of the treasurer of said county, subject to the orders of said court; that the relator demanded of said court and the justices thereof, and of the county treasurer aforesaid, payment thereof, and payment was by them refused."

This alternative writ then commanded the county court, and the justices thereof, forthwith to make and deliver to relator a warrant on the county treasurer, directing him to forthwith pay said judgment out of any funds now held by him, which have been heretofore collected for the payment of said coupons issued to said railroad company, and if there be not enough money in the treasury subject to the payment of said judgment fully to discharge the same, and for the payment of any balance remaining due upon

said judgment, you "*forthwith* proceed to *levy and cause to be collected, a special tax upon all taxable property subject to taxation in said county* in an amount sufficient to pay said judgment, interest and costs, or show cause," &c. To this alternative writ the county court and the Judges thereof filed a return and afterwards, by leave, an amended return.

The original transcript of this return sent up by the clerk, and printed in the record, contained many mortifying and inexcusable clerical errors, which, although they may not affect the substance of the plea, it would be unjust to plaintiffs in error to leave uncorrected. They have therefore filed herein another copy of said amended return. Said return set forth that the record of the cause in which the judgment was rendered, showed that the coupons merged in said judgment, were detached from bonds issued by the county court of said county, without, in any manner, obtaining the assent of the tax payers or resident voters, or qualified voters of said county, to any subscription of stock or issue of bonds or any levy of tax in payment thereof. As a plea restricting the remedy for said judgment, said return set up that an act of the general assembly of the State of Missouri, approved Nov. 23, 1857, (laws of Mo. 1857, page 18,) entitled "An act to expedite the sale of county bonds and the collection of railroad subscriptions," which act had never been revised or repealed, and was then in force, made it unlawful for any county court thereafter to bind counties by subscriptions to railroad companies without taking the sense of the taxpayers of said county for and against paying same by direct taxation, and that by an act of the General Assembly of the State of Missouri, approved March 23, 1861, (Laws of Mo. 1860–61, page 60) it was declared unlawful for the county court of any county to subscribe to the capital stock of any railroad company unless the same had been voted for by a majority of the resident voters of said county at an election thereon held. Respondents further pleaded

that by the organic law establishing the Territory of Missouri, and ever since duly continued in force in the state of Missouri, it was provided that "no man shall be deprived of his property, but by the judgment of his peers, *and* the law of the land," that the property upon which said alternative writ commanded the levy of taxes, consisted of certain real and personal property of the total value of $4,258,400, owned in severalty by several thousand citizens of the state of Missouri, none of whom was a party to this proceeding or to that which it purported to be *ancillary;* that under the laws of the state of Missouri then in force, and in force when the contracts were made, the county court could only levy taxes at the April or May terms of said court, that they proposed to make a levy of one-half of one per cent. on all property in said county subject to taxation at the May term, 1879, as they had always done during previous years; that there had never been any specific authority for levying any other taxes out of which said judgment might be paid, and that the only law which relator relied upon, and which he claimed, conferred by implication power to levy special taxes to pay the judgment was contained in section 29 of an act of the General Assembly of the state of Missouri, entitled "an act to incorporate the St. Louis and Keokuk railroad company," approved Feb. 16, 1857. Said section is set forth on page 16 of this brief.

The amended return showed that it was true and was admitted by relator upon the record of the cause in which the judgment was obtained, that the corporators named in the aforesaid act incorporating the St. Louis and Keokuk Railway Company, did not accept the terms of said act, or thereunder organize, within ten years after the date of said act, and that no subscription was made within said period to the stock of said company, either by the county of Lincoln or by the county court of Lincoln county. The bonds from which were detached the coupons merged in the judgment, purported to have been issued by the county court in

1870, and were payable ten years after date with interest at the rate of ten per cent. per annum, as evidenced by said coupons.

For a further return respondents showed that a previous county court had levied and collected for the express purpose of paying the coupons of 1877, merged in said judgment, the sum of $33,000.00, that before said judgment was obtained the county court, acting under a law requiring them so to do, (Laws of Missouri, 1875, page 45,) had loaned $13,500.00, at 6 per cent. interest to parties as set forth in detail therein; said tabular statement shows that at the date of relator's judgment, Oct. 16, 1878, the principal and accrued interest of said loans amounted to $13,721.00, being more than the amount of relator's judgment; that for about $16.000 more, suit was then pending against the ex-treasurer of the county and his bondsmen; that the county treasurer held in his hands bonds and mortgages upon real estate securing said loans which were not then due, and that there were no funds in the county treasury with which payment of relator's judgment could be then made.

Respondents further pleaded that the general assembly of the state of Missouri, by an act approved March 8th, 1879, (laws of Mo., 1879, p. 191,) had made special provision by which any one entitled to the levy of any special tax could obtain an order therefor from the circuit court of the county, and that it was made a crime for the respondents to do more than they had certified their willingness to do at the time fixed by law.

To this return relator demurred upon the ground that the facts stated in said return, showed no cause why respondents should refuse to obey the commands of the alternative writ of mandamus.

The court below held that it was the duty of the respondents to obey the writ because firstly, the provisions of the general railroad law hereinafter cited, which had been pleaded in vain as a bar to the judgment upon coupons is-

sued under special charter power, might be invoked by relator in enforcing the collection of said judgment; secondly, because there was implied power under the said special charter to levy taxes to pay the bonds issued thereunder; thirdly, because the 11th sec. of art 10 constitution of Missouri of 1875, conferred power to levy the tax ordered. On the 19th of April, 1879, the court below made an order sustaining relator's demurrer to the amended return of respondents and ordering that a peremptory writ of mandamus issue herein to be directed to the respondents. (in the caption of the order the respondents are designated as county court of Lincoln county and the *justices* thereof,) commanding them to cause the treasurer of said county forthwith to pay on the judgment heretofore rendered herein against said county in favor of relator, the amount of money now held by him which has been heretofore collected for the payment of interest coupons on bonds issued by said county to the St. Louis and Keokuk railroad company, and that for the payment of any balance remaining due and unpaid on said judgment, said respondents forthwith levy and cause to be collected in the same manner as county taxes are collected, a *special* tax on all the property in said county in accordance with the valuation last made by the county assessor of said county for county purposes in an amount to fully pay said judgment, interest and costs, &c.

Ten days thereafter the clerk seems to have issued the peremptory writ found upon page 18 of printed record varying in several material details from the order for said writ especially in that it commanded the county court and the judges thereof to "forthwith proceed to levy and cause to be collected, at the same time that taxes are collected for state and county purposes, a special tax upon all the taxable property subject to taxation in said county, in an amount sufficient to fully pay and discharge said judgment, interest and costs," &c.

In due time, July 1879, respondents sued out their writ of

error and on the 8th of September, 1879, duly superseded the final order or judgment in said proceeding. In the determination of the issues involved in this proceeding it will be necessary to compare and analyze many statutes with which it may be improper to encumber the statement. Such matter is therefore presented under separate headings.

Relevant Federal Statutes.

Sec. 716, Rev. Stat. U. S. 1873-4, p. 236, provides that "The supreme court and circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and *agreeable to the usages and principles of law*."

Sec. 914, Rev. Stat. U. S., 1873-4, p. 174, provides that "The practice, pleadings, forms and modes of proceedings in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be to the practice, pleadings and forms and modes of proceeding *existing at the time* in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

Sec. 721, Rev. Stat. U. S., 1873-4, p. 137, provides that "The laws of the several states, except where the constitution or statutes of the United States otherwise require or provide, shall be regarded as rules of decisions in trials at common law in the courts of the United States in cases where they apply."

Absence of Law Regulating Judgments Against Counties.

Although the statutes of Missouri have long contained provisions for enforcing, by special taxation, the payment

of judgments against cities or towns, no law exists, or has ever existed, authorizing the collection by taxation, of any judgment against any county, or placing a judgment against a county upon any other better footing than a claim against such county, duly allowed by the county court and for which a warrant might be drawn on the general fund for county purposes or current expenses arising from the general levy of ½ of one per cent. upon property subject to taxation for state purposes.

The Common Law

Of England and the general statute laws of England enacted prior to the fourth year of the reign of James the 1st, were adopted in Missouri in 1816, and have since remained in force, subject, of course, to any modification made by state statute.

The Missouri Statute Regulating Mandamus.

In 1825 the following law was enacted and still remains in force:

Sec. 1. Where any writ of mandamus shall be issued out of any court in this state, directed and delivered to any person *who by law* is required to make return of such writ, such person shall make his return to the first writ.

Sec. 2. When any writ of mandamus shall be issued, and return shall be made thereto, the person suing or prosecuting such writ shall plead to or traverse all or any of the material facts contained in such return.

Sec. 3. The person making such return shall reply, take issue or demur to the pleading of the party suing or prosecuting such writ.

Sec 4. Such further proceedings shall be had therein for the determination thereof, and in such manner as might

have been had if the person suing such writ had brought his civil action for false return.

SEC. 5. If any issue shall be joined upon such proceedings, the person suing such writ shall try the same in the court from which such writ of mandamus issued.

SEC. 6. In case a verdict shall be found for the person suing such writ, or judgment given for him on demurrer, or by *nil dicit*, or for want of a replication or other pleading, he shall recover his damages and costs, in such manner as he might have done in a civil action for a false return, and the same may be levied by execution as in other cases.

SEC. 7. A peremptory writ of mandamus shall be granted, without delay, for him for whom judgment shall be given, as might have been if such return had been adjudged insufficient.

SEC. 8. In case judgment shall be given for the person making the return to the writ, he shall recover his costs of suit, to be levied by execution, as in other cases.

SEC. 9. If any damages shall be recovered, by virtue of this chapter, against any person making return to such writ, he shall not be liable to be sued in any other action or suit for making such return.

SEC. 10. The court issuing any writ of mandamus may allow to the person to whom such writ shall be directed, or other person who shall sue or prosecute the same, such convenient time, respectively, to make return, plead, answer, reply or demur, as to the court shall seem just and reasonable.

POWERS OF COUNTY COURT TO BIND COUNTY UNDER GENERAL RAILROAD LAWS OF MISSOURI.

The first general railroad law took effect Feb. 24, 1853. This was repealed by the general revision of the statutes, made in 1855. (Revised Statutes of Mo., 1855, sec. 20,

page, 1026,) and this in turn was partially repealed by the general statutes of 1865. The revised statutes of 1855 were in force when the special charter power was granted.

The last revision, in force when the contracts herein involved were made was that contained in the general statutes of Mo., of 1865.

With the exceptions noted, the law was re-enacted in all these revisions.

The law of 1855 is here quoted, with notes in brackets, showing similar sections in law of 1865:

Revised Statutes of Mo., 1855, vol. 1, p. 427.

SEC. 30. "It shall be lawful for the county court of any county, and the city council of any city, to subscribe to the capital stock of any railroad company *duly organized* under *this or any other act in this state*; and the county court or city council subscribing, or proposing to subscribe, to such capital stock, may, for information, cause an election to be held, to ascertain the sense of the tax payers of such county or such city as to such subscription, and as to whether the same shall be paid by issue of county or city bonds, as the case may be, or by taxation."

The word "may" in above section always meant "shall." (42 M. R., page 171, 1869.)

This section was amended Jan. 14, 1860, by substituting the word "shall" for "may." [Laws of Mo. 1859-60, page 88.

The general law was further altered by the supplemental act dated March 23, 1861. (Laws of Mo. 1860-1861, page 60,) by declaring it be unlawful for the county court of any county to exercise the powers conferred by said section 30, unless the same had been voted for by a majority of the resident voters.

This act was not repealed by the subsequent revision because it was a separate act. (G. S. Mo. 1865, p. 897, sec. 5 and 6.

By the revision of 1865, there was substituted for said section 30, of the general railroad law of 1855, the following:

Sec. 17, of Chapter 63, general statutes of Mo., 1865, p. 348. "It shall be lawful for the county court of any county to take stock for such county, etc., in, *or to loan the credit* thereof to any railroad company, *duly organized* under this or any other law, provided that two-thirds of the qualified voters of such county, etc., at a regular or special election to be held therein, shall assent to such subscription."

SEC. 31. R. S. of Mo. 1855, page 427, (sec. 18, G. S. of Mo. 1865, page 338.) Upon the making of such subscription by any county court or city, *as provided for in the previous section, such county or city shall thereupon become, like other subscribers to such stock, entitled to the privileges granted, and subject to the liabilities imposed, by this act, or by the charter of the company in which such subscription shall be made. And, in order to raise funds to pay the installments which may be called for, from time to time, by the board of directors of such railroad, it shall be the duty of the county court or city council making such subscription, to issue their bonds, or levy a special tax,* upon all property and taxables made taxable by law for state and county purposes, *and upon the actual capital that all merchants and grocers may have invested in business*, in the county or city, to pay such installments, to be kept apart from other funds, and appropriated to no other purpose than the payment of such subscription; but the total amount of tax levied for railroad purposes in any one year, in any county or city, shall not exceed thirty per centum of the subscription made by such county or city; and in case a subscription be made to the capital stock of the same railroad company by a county, and, also, by a city situated within such county, the special tax aforesaid shall not be levied in both such county and city, but the tax levied for such county subscription shall be levied out-

side of the limits of such city; and, for the purpose of levying and collecting the tax aforesaid, the same books may be used as employed by the assessor of taxes for state or county purposes, and the last previous assessment for those purposes shall be taken. (This section was amended, but to an inconsiderable extent, by the revision of 1865.)

SEC. 32, (sec. 19, G. S. 1865.) For all such taxes levied and collected for railroad purposes, the county court or the city council, as the case may be, shall cause to be issued and delivered to the *persons paying such special tax*, a certificate for the amounts thereof paid; and such certificate shall state the county or city in which, and the railroad for which, the tax was collected, and shall be transferable by the holders thereof, and convertible into stock of such railroad, whenever presented in amounts equal to one or more entire shares of the stock of such railroad, to such proper officer of such county court or city council as shall be designated by such court or council, by transfer to be made by such officer, in conformity with the *by-laws of the railroad company*. And when such transfer is made, said company shall issue a certificate of stock to the person entitled thereto, or his legal representatives, for the *number of full shares thus transferred*: *Provided*, That no such certificate of stock shall issue upon such transfer, unless the full amount of the par value thereon shall have first been paid to the railroad company, by the county court or city council; and *Provided further*, That the total amount of stock certificates so to be issued shall not exceed the amount of the subscription made by such county or city; *and in case any of the tax payers* in any county or city in which a railroad tax shall be levied, shall have subscribed, in good faith, to the capital stock of any railroad to which the county or city shall have subscribed, the same shall be entitled to a credit or deduction on the amounts assessed upon them respectively, in proportion to the amounts of their *bona fide* subscriptions, until the ag-

gregate amount of such credits or deductions shall be equal to the amount of their subscriptions, respectively, but thereafter such subscribers shall be liable to the tax aforesaid, as other persons. The assessment, collection and payment of the taxes authorized by this section, shall be provided for and enforced as any other taxes for county or highway purposes, and the county court or city council may require additional security from the collector. And, for any of the objects contemplated by this section, the county court of any county, or the city council of any city interested, may appoint and empower an agent to represent the county or city, subscribe or transfer its stock, give its vote and receive its dividends, if any, and such agent to change at pleasure.

SEC. 33. (G. S. Mo., 1865, sec. 20.) Any county subscribing for railroad stock which shall have internal improvement funds, or overflowed or swamp lands, granted to it by the state, may apply such funds, or mortgage or sell such overflowed or swamp lands, to pay such subscription or any part thereof, and provide for the remainder, if any, *by the tax as aforesaid*; and any county or city subscribing as aforesaid, may (if so required by the railroad company, to raise funds to pay the installments in anticipation of the collection and payment of its railroad tax,) issue the bonds of such city or county, of denominations not exceeding one thousand dollars, and bearing interest at a rate not exceeding *seven* per cent. per annum.

SEC. 34. (G. S. Mo. 1865, sec. 21, page 339.) Any county court or city which has *heretofore* subscribed to the capital stock of any railroad in this state, shall be entitled to the privileges, and subject to the liabilities of other stockholders in such company, and the county court or city council *shall have all the rights and powers* to provide funds to pay *such subscription* as are granted to county courts and cities by this act, and may levy a *special tax to pay the interest on their bonds*, or to provide a sinking fund to pay the principal.

SEC. 35. (22 G. S. 1865.) Any county court refusing to perform any of the duties required of it by this act, may be proceeded against by writ of *mandamus*, to be issued out of the *criminal court for the county* so refusing. (This section was altered in the revision of 1865, by substituting the word "circuit" for "criminal." It was not revised in 1870, as intimated upon the margin of Wagner's statutes.)

SEC. 57. (Sec. 48, G. S, 1865.) All existing railroad corporations within this state, and such as *now* or may be hereafter chartered, shall, respectively, have and possess all the powers and privileges contained in this act; and they shall be subject to all the duties, liabilities and provisions, not inconsistent with the provisions of their charter, contained in this act.

POWER OF COUNTY COURT TO BIND COUNTY UNDER THE SPECIAL LAWS.

An act of the general assembly of the state of Missouri enittled, "An act to incorporate the St. Louis and Keokuk railroad company," contains the following sections relevant to the issues involved in this case:

SEC. 1. A company is hereby incorporated, called the St. Louis & Keokuk railroad company, the capital stock of which shall be six millions of dollars, to be divided into *shares of one hundred dollars* each; the *holders of which*, their successors and assigns, *shall constitute a body corporate and politic*, etc., shall be able, in law and equity, to make contracts, &c.

SEC. 2. J. R. Barrett, etc., or any nine of them, shall constitute the first board of directors under this act, and shall hold their office until their successors be qualified. They shall, *within ten years* after the passage of this act, meet and organize as a board of directors; *and when organized*, they shall cause books to be opened for the *subscription* of the *capital stock* of said company.

SEC. 3. So soon as fifteen hundred shares shall be subscribed, the directors shall cause an election to be held for nine directors, etc.

SEC. 26. Said company shall commence the construction of said road within ten years from the passage of this act, etc.

SEC. 29. It shall be lawful for the *county court of any county in which* any part of the route of said railroad may be, *to subscribe to the stock of said company;* and it may invest its funds in the stock of said company, and issue the bonds of said county to *raise funds to pay the stock thus subscribed, and to* take proper steps to protect the interest and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends.

SEC. 36. This act and the company hereby incorporated, are exempted from the seventh, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth and nineteenth sections of this first article of the act concerning corporations, approved Nov. 23, 1855.

This act to be in force from and after its passage.

The seventh section of the first article concerning corporations, from the operation of which said charter was exempted, reserved the right to repeal, alter or suspend any charter thereafter granted.

The sixth section of said act of November 23, 1855, not excepted from application to said charter nor entirely repealed by implication, but at best merely modified so as to *allow ten years* for organization, instead of *one* year, provided, R. S. 1855, p. 371, "if any corporation hereafter *created* by the legislature, shall not *organize* and commence the transaction of its business within one year from the date of its incorporation, its corporate powers shall cease."

Subsisting Special Laws Restraining Power of County Court.

On the 23d of November, 1857, Laws of Mo. 1857, page 18, by sec. 2 of an act entitled "An act to expedite the sale of county bonds and the collection of county subscriptions," which act has never been revised, and therefore remains in force, it was declared to be unlawful for any county court thereafter to subscribe to the capital stock of any railroad company without first causing a poll to be opened at the election precincts in said county, to take the sense of the tax payers of the same for and against paying said subscription by direct taxation. It was confessed by the pleadings in this proceeding that no such election was ever held, and that the relator, upon record of the cause wherein the judgment was rendered, so confessed. (See p. 12 of printed record.) It should be borne in mind that it was also confessed by relator that there was no election of resident voters, as required by supplemental act of March 23, 1861. (Laws of Mo. 1861, p. 60, or of qualified voters as required by general statutes of 1865, sec. 17, p. 338.

It is confessed by relator (see page 12 of printed record) that no organization of the corporation was had within ten years after the date of act of incorporation.

Sec. 4, of Art. VIII of the constitution of Missouri, of 1865, provided that "corporations may be formed under general laws, but shall not be created by special acts, except for municipal purposes."

Section 2, of the same Article of said constitution, provided that "No law shall be passed reviving or re-enacting any act heretofore passed creating any private corporation where such corporation shall not have been organized and commenced the transaction of its business within one year from the time such act took effect, or within such other time as may have been prescribed in such act for such organization and commencement of business." (General Statutes of Mo., 1865, p. 39.)

On the thirtieth of January, 1872, (Laws of Mo., p. 76) the General Assembly of the state of Missouri, by an act entitled "An act to repeal certain sections of law, granting to county courts and other corporate bodies the power to subscribe stock to railroad companies," repealed section 29 of the act of the General Assembly of the State of Missouri, incorporating the St. Louis & Keokuk railroad company, approved February 15, 1857, which section 29 contained the power of any county court to subscribe stock and issue bonds to the St. Louis & Keokuk railroad company, and as the court below held, implied power to levy unlimited special taxes.

By a law, taking effect February 16, 1872, entitled, "An act to protect counties, cities and incorporated towns from combinations between railroad companies, county courts," etc., it was made a felony for any justice of a county court thereafter to vote, to subscribe stock or loan the credit of such county to any railroad company, unless authorized so to do by a two-thirds vote of the voters of such county. (Laws of Mo., 1872, p. 19.)

The constitution of Missouri, in force since Nov. 30th, 1875, provided, Sec. 3, Art. VI, that the supreme court should have power to issue writs of mandamus, etc., and by Sec. 23, that circuit courts (of the state) should have exclusive original jurisdiction in all civil cases not otherwise provided, and by Sec. 24 was authorized to exercise a superintending control over criminal courts, county courts, etc. (Revised Statutes of Mo., 1879, pages LXX and LXXII.)

Sec. 4 of Art. II, (p. LV, R. S. M., 1879,) provides that the principal office of government is to secure to every person the natural right to life, liberty and property, and that the government which does not confer such security is a failure.

Sec. 20, (p. LVII, R. S. Mo., 1879) provides that whenever an attempt is made to take private property for a use alleged to be public, the question shall be a judicial

one, and as such, judicially determined without regard to any legislative assertion that the use is public.

Sec. 1 of Art. IX, (p. LXXV, R. S. Mo., 1877) provides that the several counties of the state as they now exist are hereby recognized as legal subdivisions of the state.

Sec. 6, of the same Art., prohibits any county, etc., from subscribing to stock and against loaning its credit in aid of any railroad or other corporation, and expressly repeals all authority theretofore conferred for any of the purposes aforesaid by the general assembly. Provided, however, "That nothing in this constitution contained shall affect the right of any such municipality to make such subscription where the same has been authorized under existing laws by a *vote of the people* of such municipality prior to its adoption, or to prevent the issue of renewal bonds or the use of such *other means* as are or *may be prescribed by law* for the liquidation or payment of *such* subscriptions or of any existing indebtedness.

Sec. 1 of Art. X, (R. S. of Mo., 1879, p. LXXX) provides:

The taxing power may be exercised by the general assembly for state purposes, and by counties and municipal corporations under power granted to them by the general assembly for county and other corporate purposes.

Sec. 10 of the same Article of said constitution of 1875, (p. LXXX, R. S. of Mo., 1879,) provided: The general assembly shall not impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof for county, city, town or other municipal purpose, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.

Sec. 11 of said Article provided that taxes for county purposes in counties having less than six millions of dollars should not in the aggregate exceed fifty cents on the hundred, and for counties having a larger amount of taxa-

ble property, a smaller rate of taxation, but it is admitted that in this case, the property assessed for state and county purposes was less than four millions of dollars. Said section concludes with these words, constituting one of the three grounds upon which the court below held that the law of March 8, 1879, set up in the return, impaired the obligation of contracts, made five years prior to the adoption of said constitution: "Said restriction as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing on bonds, which may be issued in renewal of such indebtedness."

Sec 19 of Art. XII (page LXXXVI, R. S. of Mo. 1879) provided that, "The general assembly shall pass no law for the benefit of a railroad or other corporation, or any individual, etc., retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past."

The Acts of 1877 Authorizing Special Taxes.

On the 14th of April, 1877, the general assembly of the state of Missouri (Laws of Missouri 1877, page 198) authorized the county court of any county, &c., having a bonded indebtedness, in their discretion to levy at the time of making the annual levy for county purposes, a special tax not exceeding five mills on the dollar, and invest the same in state or government bonds, which might be sold, and the proceeds invested in purchasing said county bonds.

On the 28th of April, 1877, (Laws of Mo. 1877, page 200) the general assembly by an act entitled "An act to authorize the county courts of the several counties of this state to levy a special tax to pay the valid floating indebtedness of such counties, which existed at the date of the constitution of 1875," provided as follows:

SEC. 1. The county courts of the several counties in this state are hereby empowered to levy an annual tax on all property made taxable under the laws of this state for the purpose of paying any valid floating indebtedness existing at the date of the adoption of the constitution of 1875, which tax shall be extended, collected and accounted for, as is now provided by law for the extension, collection and settlement of the county revenue; *provided* that in *no case* shall the annual levy exceed one per centum of such taxable property, county warrants, script and other evidences of such valid indebtedness as are hereby made receivable in payment of such tax.

SEC. 2 repeals all inconsistent acts.

SEC. 3 provides that an emergency exists for the immediate taking effect of said law because there are several counties in the state whose revenue is in ufficient to pay off their valid floating indebtedness, and to also meet their current expenses.

THE LAW OF MARCH 8TH, 1879.

Before the order for peremptory mandamus herein, the general assembly of the state of Missouri (laws of Mo. 1879, page 185) enacted as follows:

SECTION 1. The following named taxes shall hereafter be assessed, levied and collected in the several counties in this state, and only in the manner and not to exceed the rates prescribed by the constitution and the laws of this state, viz: the state tax and the tax necessary to pay the funded or bonded debt of the state, the tax for current county expenditures and schools.

SEC. 2. No other tax for any purpose shall be assessed, levied or collected, except under the following limitations and conditions, viz: the prosecuting attorney or county attorney of any county, upon the request of the county court of such county—which request shall be of record

with the proceedings of said court; and such court, being first satisfied that there exists a necessity for the assessment, levy and collection of other taxes than those enumerated and specified in the preceding section—shall present a petition to the circuit court of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed, levied and collected: and such circuit court or judge thereof, upon being satisfied of the necessity for such other tax or taxes, and the assessment, levy and collection thereof will not be in conflict with the constitution and laws of this state, shall make an order directed to the county court of such county, commanding such court to have assessed, levied and collected such other tax or taxes, and shall enforce such order by mandamus or otherwise. Such order, when so granted, shall be a continuous order, and shall authorize the annual assessment, levy and collection of such other tax or taxes for the purpose in the order mentioned and specified, and until such order be modified, set aside and annulled by the circuit court, or judge thereof, granting the same: *Provided*, that no such order shall be modified, set aside or annulled, unless it shall appear, to the satisfaction of such circuit court or judge thereof, that the taxes so ordered to be assessed, levied and collected are not authorized by the constitution and laws of this state, or unless it shall appear to said circuit court or judge thereof, that the necessity for such other tax or taxes, or any part thereof no longer exists.

SEC. 3. Any county court judge, or other county officer in this state, who shall assess, levy or collect, or who shall attempt to assess, levy or collect, or cause to be assessed, levied or collected, any tax or taxes other than those specified and enumerated in section one of this act, without being first ordered so to do by the circuit court of the county, or the judge thereof, in the express manner provided and directed in section two of this act, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be

punished by fine not less than five hundred dollars, and, in addition to such punishment, his office shall become vacant; and the method herein provided for the assessment, levy and collection of any tax or taxes not enumerated and specified in section one of this act, shall be the only method known to the law whereby such tax or taxes may be assessed or collected, or ordered to be assessed, levied or collected.

SEC. 4. The last preceding [section] shall be construed to extend and apply to the county court of any county, as well as to any judge thereof, and to extend and apply to the county board of equalization, and to any other body holding or exercising any county office or public trust in the county, under the constitution and laws of this state.

SEC. 5. Any county court or judge thereof, or county treasurer, or county clerk, or other county officer, who shall order the payment of any money, draw any warrant or pay over any money for any purpose other than the specific purpose for which the same was assessed, levied and collected, or shall in any way or manner attempt so to do, shall be adjudged guilty of a misdemeanor, and, on conviction thereof, shall be punished as provided in section three of this act.

SEC. 6. The right of appeal to the supreme court of this state, under any of the provisions of this act, is hereby preserved to any and all persons, officers or parties in any wise affected thereby, as in other cases, and may be prosecuted as in other civil cases.

SEC. 7. All acts and parts of acts inconsistent with this act, or in any manner whatever conflicting with the provisions of this act, are hereby repealed.

SEC. 8. The time fixed by law for the assessing and levying of state and county taxes, and for extending the same upon the tax books, in the several counties of this state, being within ninety days from the passage of this act, creates an emergency that demands the immediate

enforcement thereof; therefore, this act shall take effect and be in force from and after its passage.

Approved March 8th, 1879.

The Law of March 19th, 1879.

The general assembly of the state of Missouri, by law taking effect on the 19th of March, 1879 (laws of Mo. 1879, page 191) enacted as follows:

Section 1. The county courts of the several counties of this state are hereby authorized and empowered, at the first regular term of such court, after the taking effect of this act, and at the May term every year thereafter, to appropriate, apportion and subdivide all the revenues collected, and moneys received, and to be received, in the various counties of the state, for county purposes, in the following manner:

First—A sum sufficient for the payment of all the necessary expenses that may be incurred for the care of paupers and insane persons of such county.

Second—A sum sufficient for the payment of all necessary expenses for the building of bridges and repairing of roads, including the road overseers of such county.

Third—A sum sufficient for the payment of the salary of all county officers, where the same is, by law, made payable out of the ordinary revenues of the county.

Fourth—A sum sufficient for the payment of the fees of grand and petit jurors, judges and clerks of elections, and fees of witnesses for the grand jury of the county.

Fifth—A sum sufficient for the payment of the other ordinary current expenses of the county, not hereinbefore specially provided for, which shall be known and designated as the contingent fund of such county. Which last sum shall in no case exceed one-fifth of the total revenue of such county for county purposes for any one year.

Sec. 2. The county courts of the various counties of

this state are hereby authorized and empowered, at the first regular term of such court after taking effect of this act, and at the May term every year thereafter, to make an order and cause the same to be spread upon the records of such court, setting apart, appropriating, apportioning and subdividing the revenues of any county for county purposes, as the same is set forth and specified in section one of this act, and when the order shall thus be made and spread upon the records of any county in the state, the moneys so set apart, appropriated, apportioned and subdivided shall be held to be a sacred fund for the purpose for which it has been designated; and the county court thus making the order shall have no power to divert the same or to permit the funds thus set apart to be drawn from the treasury of such county, except by warrants issued by order of such court on the respective funds so set apart, and for the purposes in section one of this act specified and set forth: *Provided*, that nothing in this act shall be so construed as to authorize any county court in this state to make a levy for county purposes greater than that prescribed in section 11 of article 10 of the constitution.

SEC. 3. It shall be the duty of the county treasurer to separate and subdivide the revenues of such county in his hands, and as they come into his hands, in compliance with such order of court and the provisions of this act; and it shall be his duty to pay out the revenues thus subdivided, on warrants issued by order of the court, on the respective funds so set apart and subdivided, and not otherwise; and for this purpose the treasurer shall keep a separate account with the county court of each fund, which several funds shall be known and designated respectively as the pauper fund, road and bridge fund, fund for the payment of the salary of county officers, fund for the payment of fees of grand and petit jurors, judges and clerks of elections, and witnesses of the grand jury, and contingent fund; and no warrant shall be paid out of any fund other than that upon which it has been drawn by order of

the court as aforesaid. Any county treasurer or other county officer, who shall fail or refuse to perform the duties required of him or them under the provisions of this act, and in the express manner provided and directed, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars, and not more than five hundred dollars, and, in addition to such punishment, his office shall become vacant.

SEC. 4. When a demand against a county is presented to the county court, the usual form of entry may be exemplified thus: A B vs. —— county. The account of A B for the sum of —— dollars being presented and inquired into, it is found by the court that the sum of —— dollars is due him from the county, payable out of (express the particular fund as the case may require), and for which the clerk is ordered to issue a warrant. When the court shall ascertain any sum of money to be due from the county, they shall order their clerks to issue a warrant therefor in the following form: Treasurer of the county of —— pay to ——, —— dollars out of any money in the treasury appropriated for (express the particular fund as the case may require.) Given at the court-house, this —— day of ——, 18—, by order of the county court. A B, President. Attest: C D, Clerk.

SEC. 5. All acts and parts of acts inconsistent with the provisions of this act be, and the same are hereby repealed.

SEC. 6. The proper expenditure of the revenues collected for county purposes, their appropriation, apportionment and subdivision for the purposes for which they are levied and collected, and the maintenance of the credit of county governments, creates an emergency requiring this act to take effect at once; therefore, this act shall take effect and be in force from and after its passage.

Approved March 19th, 1879.

The Law of May 16th, 1879.

By section 12 of an act (laws of Mo. 1879, page 53) taking effect May 16th, 1879, the general assembly of the state of Missouri specifically repealed the several acts, at any time previously enacted concerning levy of special taxes to pay county bonded indebtedness, &c., all of which acts, it is contended by plaintiffs in error, had already been generally repealed, by sections 7 and 5 respectively of two acts of March 8th and 19th, 1879. (Laws of Mo. 1879, pp. 186 and 193.

Other Relevant General Revenue Laws of the State of Missouri, 1857-1872.

At all times the assessment, levy and collection of taxes whether general or special in the several counties of Missouri, and the control and disbursement of all revenue has been specifically subjected to the provisions of general revenue laws.

During the period intervening between the passage of the act, incorporating the St. Louis and Keokuk railroad company in 1857, and the date of the issue of the bonds and coupons merged in the judgment, no less than twenty-nine amendments were made in the revenue laws of Missouri. Under the law of 1865, (general statutes of Mo. 1865, p. 131,) a similar section of 1855 was re-enacted:

By Sec. 76, County courts were empowered to levy such sums as may be annually necessary to defray the expenses of the respective counties by a tax upon all property and *licenses* made taxable by law for state purposes, "but the county tax shall in *no case* exceed the state tax on the same subject of taxation more than one hundred per cent." excepting the county of St. Louis. Sec. 1, of ch. 11, G. S. of Mo. 1865, page 95, provided that, "for the support of the

government of the state, the payment of public debt and the advancement of the public interest, taxes shall be levied on the following persons and objects: All male persons over age of twenty-one and under fifty years, and on all property, real and personal with certain exceptions noted, 40 cents on the hundred dollars.

On the 12th of March, 1867, [laws of Mo., 1867, page 157,] the state tax was reduced to twenty-five cents on the one hundred dollars.

The Law Limiting Taxes for County Purposes when the Contracts were Made.

The record shows (page 14, of printed record) that the subscription of stock and the issue of bonds and coupons herein involved, occurred after the taking effect of the following amendment to the revenue law, approved Jany. 30, 1868, (laws of Missouri, 1868, page 142.)

Section 1. That section three of chapter eleven of the general statutes of the state of Missouri be so amended as to read as follows: "*No* tax shall be assessed or imposed by *any* city, county, or other municipal corporation, or for their use, upon the following property, when the title thereto is vested in any person or persons, or in a corporation duly organized under the laws of this state, or in the trustees, curators or directors thereof :—Seventh. Household property not exceeding the value of three hundred dollars, while the same is held and used for that purpose only, or other property to the amount of three hundred dollars."

Sec. 2. That section seventy-six of chapter thirteen, general statutes, be amended to read as follows : "The several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties by a tax upon all property and licenses made taxable by law for state purposes, except what is

herein excepted by this act; but the county tax shall in *no case* exceed the state revenue tax on the same subjects of taxation more than one hundred per centum for the same time; but the county court of St. Louis county is empowered to impose such additional taxes to pay *fines* (sic) and for *other purposes* as may be prescribed by law."

SEC. 3. This act to take effect from and after its passage.

This law was re-enacted in the amendment of 1872. (See Wagner's Missouri statutes, vol. 2, page 1123, sec. 165.

THE MODE OF ASSESSMENT, LEVY AND COLLECTION OF TAXES.

At the outset an assessor was charged with the duty of preparing lists of all property subject to taxation. [General statutes of Mo. 1865, ch. 12, page 98, Wagner's Mo. statutes 1872, page 1163.

After the assessment had been made a county board of equalization, composed of the county clerk, the justices of the county court, the county surveyor and the county assessor, heard appeals and rectified the assessments. [Revised statutes of Mo. 1865, page 97, sec. 13. Wagner's Mo. statutes 1872, page 1161, sec. 14.

When the contracts were made, and when the mandamus issued, this board of equalization was required to sit in April.

After the adjournment of the board of equalization, their work was to be submitted to the county court in the month of May, for further scrutiny and hearing of appeals. [General statutes of Mo. 1865, page 106, sections 55 and 56. Wagner's Mo. statutes 1872, p. 1162, sec. 16, p. 1172, sec. 70.

As soon as the assessor's book had been corrected and adjusted according to law, the county court were required to ascertain the amount necessary to be raised for

county purposes, (subject to the restriction of 80 cents on each hundred dollars in 1865, and 50 cents on each hundred dollars after 1867, and at date of mandamus—[G. S. of Mo. 1865, page 121, sections 76, 77 and 78. Laws of Mo. 1867, page 157. Wagner's statutes 1872, page 1193, sections 165, 166, 167,) and to levy same by causing the order to be entered upon the records of said court.

Within ninety days after the time at which the assessor's book may have been corrected, the clerk of the county court having extended the taxes therein was required to make a fair copy thereof, and to deliver same to the county collector, an officer elected by the people. [G S. of Mo. 1865, page 105, sec. 51. Wagner's statutes of Mo. 1873, page 1171, sections 65 and 66.

Through the provisions of law, elaborate in detail, the collector having given bond for the faithful discharge of his duty, proceeded to collect the taxes entered upon the aforesaid tax book. [G. S. of Mo. 1865, ch. 13, page 112. Wagner's statutes of Mo. 1872, page 1178, et sequitur.

On the third Monday in January, succeeding the receipt of such tax book, the collector was required to make settlement with the county court of all taxes, state or county, school and other taxes, receiving credit for his delinquent list. Then by a process materially amended March 10 and March 18, 1870, (Laws of Mo. 1870, pages 114 to 123 inclusive,) and again materially amended in 1871-72, (Wagner's Mo. statutes 1872,) proceedings were to be had through the courts against real estate for the enforcement of taxes thereon due.

It becomes important to compare these conflicting laws of 1870, when the contract was made, and the unrepealed provisions of the laws of 1872, in force when the mandamus issued in order to determine what was the duty of the county court, and what the duty of other county officials at the date of mandamus. Under the law of 1870, (Laws of Mo. 1870, page 114 to 123, inclusive), the delinquent land

tax book was filed in the office of the county clerk and any one as provided by section 9, might buy the lien upon any tract, and might thereafter in the circuit court enforce said lien.

By sec. 11, under the law enacted in 1872, and still in force at the date of mandamus the collector (Wagner's Mo. statutes 1872, page 1196, sec. 183,) applied to the county court, declared (sec. 182) to be a court of original jurisdiction for enforcing liens for judgments, at a special term to be held on the third Monday in July in each year, upon notice provided for persons concerned, who were allowed to defend, (sec. 192,) and the court was required to give judgment "as the right of the case may be," and where judgment was rendered against the land the same was to be signed and to have the same force and effect as judgments of circuit or other courts of record, (sec. 193.)

By sec. 194 the right of appeal to the circuit court was guaranteed to all persons aggrieved, and in default of such appeal by sec. 195, the clerk of the county court made out a copy of said judgment under which the collector sold the property, &c., and two years thereafter (sec. 216-217,) conveyed same in the same manner as sheriffs convey under execution sales. The collector having settled, paid over the amount found due to the county treasurer. [G. S. Mo. 1865, page 121. Wagner's Mo. statutes 1872, page 1193, sec. 168.

By sec. 231, Wagner's Mo. statutes, page 1210 and sec. 128, [General statutes of Mo. 1865, page 130,] if the collector failed to pay over monies in anywise collected by him for taxes or revenue, the circuit court was vested with power to hear and determine suits against him and his bondsmen determined in the same manner as other cases the liability of the collector.

Sec. 129, G. S. of Mo. 1865, page 130 [and sec. 232.

Wagner's statutes of 1872,] made the before mentioned sec. applicable to county treasurers and their sureties. The county treasurer was after March 22, 1870, also an officer elected by the people. By Wagner's Mo. statutes 1872, page 412, sec. 16, he was required to settle his accounts annually with the county and in default liable to criminal as well as civil proceedings set forth in sec. 18. page 412.

ASSIGNMENT OF ERRORS.

I.

The court below erred in sustaining relator's demurrer to the amended return of respondents, and in the final judgment therewith made, ordering a peremptory writ of mandamus.

II.

The court below erred in declaring the law to be in favor of relator upon the facts pleaded by respondents in their amended return, and confessed by relator's demurrer thereto.

III.

The amended return of respondents to the alternative writ of mandamus, not only showed that every duty imposed by law upon respondents, had been duly performed, but that they were not by law required to make return of the writ to them directed. The demurrer to said return bringing up the sufficiency of all pleadings which had preceded it, the court erred in failing to quash the alternative writ of mandamus, and to dismiss relator's petition.

IV.

The peremptory writ of mandamus herein issued was not in conformity to, or authorized by the final order therefor.

V.

The final Judgment for said peremptory writ (page 26 of printed record) does not set forth facts giving the

court jurisdiction either of the subject matter of said order, or of the persons of the respondents named in the caption thereof, as "county court of Lincoln county, and the justices thereof." In a judgment against county courts, &c., this final order merely recites a judgment for no particular sum heretofore rendered "*herein*" against a party not named in the caption, and designated in the body of the order as said county of Lincoln." Nothing is said as to how, or for what amount, or when such judgment was rendered, or why it had not been collected by ordinary process of law, or what relation the parties as respondents named in the caption of said final order for peremptory mandamus sustained to said county, nor did said final judgment show the all important fact that it was under any law the duty of any parties named as respondents to obey either of the distinct and conflicting commands of said order.

Said judgment for peremptory mandamus was without authority of law in this that it required the respondents named "forthwith to cause the treasurer of said county," a state officer whose actions were beyond their control "to pay on the judgment heretofore rendered herein the amount of money now held by him," &c., and further required said respondents, "forthwith to levy and cause to be collected, a *special* tax on all the property in said county of Lincoln," in a sum sufficient fully to pay said judgment, and the same to apply to payment thereof, without in any wise informing the county court or the justices to whom the writ is ordered to go, by what authority or in what manner they should not only make an untimely levy of an extraordinary tax, but forthwith cause the same to be collected.

Said final order is vague, uncertain and void, and does not conform to the alternative writ, or the order therefor, or relator's petition for a writ of mandamus, or the alternative writ, or the order therefor, or relator's petition therefor.

VI.

The peremptory writ of mandamus was not directed to "county court of Lincoln county and the *justices* thereof," against whom the final judgment was entered (printed record page 19), but to "the county court of Lincoln county, and to the *juages* thereof." Said writ was void and without authority of law, especially in this, that it commanded distinct and inconsistent acts. It commanded the drawing and delivery to relator of a warrant in favor of relator, for the entire amount of his judgment, interest and costs, and secondly, if after having thus satisfied said judgment, it happened that there were not then funds sufficient to pay said warrant, relator need not wait until funds were raised, but respondents were required forthwith not only to levy, but to cause to be collected a special tax upon all taxable property subject to taxation in said county, in an amount sufficient fully to discharge said judgment, &c., and the same to apply to the payment thereof. Said peremptory writ does not show that it is the duty of respondents to obey same, nor does it point out the manner in which the respondents should perform duties, not only unsanctioned by, but forbidden, under penalty, by the laws of the state of which they were sworn officers.

VII.

The alternative writ of mandamus (printed record page 8) did not conform to, and was not authorized by the order therefor, nor the relators petition for mandamus. Said alternative writ did not show by what law it was the duty of those to whom it was directed to obey its commands.

Said writ contained separate, inconsistent and extraordinary commands, and failed to indicate the manner in which

respondents could perform the same or any legal authority therefor.

Said writ upon its face was vague, uncertain and void.

VIII.

The order for said alternative writ of mandamus upon its face recited that a sufficient sum applicable to the payment of the judgment had been already collected by special tax and placed in the hands of the treasurer of said county, an officer beyond the control of the respondents, but certainly subject to mandamus from the circuit court of the United States for the eastern district of Missouri, if the averment was true.

The order for an alternative writ of mandamus, was not responsive to the relator's petition therein recited. It did not show where, how, in what court relator obtained a judgment against "said county" or what relation the county court of Lincoln county and the justices thereof named therein bore to "said county."

It did not show that it was by any law the duty of said respondents to perform either of the commands in said order contained. It commanded the doing of separate, inconsistent and unauthorized acts, and did not indicate the manner in which either of the same could be performed; it named the individuals to whom the court was to issue as "justices" and not by their proper titles of "judges." The order was vague, uncertain and void.

IX.

The relator's petition as recited in the order for alternative writ, and found in the transcript shows no right to the extraordinary writ of mandamus.

The petition sets forth no special law under which the coupons alleged to have been merged in the judgment,

were issued. It does not aver that he has ever demanded of this county court and the justices thereof the levy of any special tax, as directed either in the subsequent order or writ of mandamus. He does not show that it was the duty of the county court, and the justices thereof to grant the relief for which he prays, or that he has ever demanded of anybody the doing of the acts for which he prays an order.

The petition shows that the treasurer of the county, an officer not under the control of the county court but certainly, under the averments, within the control of the United States circuit court for the eastern district of Missouri, held in his hands a sufficient sum levied and collected in 1877, to pay the very coupons merged in the judgment, and that he was the party to whom the writ should have been directed.

POINTS, AUTHORITIES AND ARGUMENT.

I.

"Writs of mandamus may only be issued by circuit courts of the United States, where their use by the state courts for that purpose is sanctioned by state laws."

Graham vs. Norton, 15 Wall. 428.
Riggs vs. Johnson Co., 6 Wall. 186.

"The power to levy and collect taxes is a legislative function, and can only be enforced by a court of law through officers authorized by the legislature to levy the tax if a writ of mandamus is applicable to that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but is an invasion by the judiciary of the legislative functions of the state government, and would involve consequences the end of which no wisdom can foresee." Opinion of this court delivered by Mr. Justice Miller in

Heine vs. Levee Commissioners, 19 Wall. 661.
Rees vs. Waterton, 19 Wall. 120.
Merriweather v. Garrett, U. S. Supreme Court, Oct. term, 1880.

The party applying for mandamus must not only show that he has no other remedy, but that he has a specific right, otherwise the writ is fatally defective.

State vs. Governor, 39 M. R. 456.
State vs. Lafayette county, 41 M. R. 221.
State vs. McAuliffe, 48 M. R. 112.

II.

NEITHER IN THE 29th SECTION OF THE ACT INCORPORATING THE ST. LOUIS AND KEOKUK RAILROAD COMPANY,

(Laws of Mo. 1856–7, page 125), NOR IN ANY PART OF SAID ACT WAS THERE ANY EXPRESS AUTHORITY TO LEVY SPECIAL TAXES. NO SUCH POWER CAN BE IMPLIED, BECAUSE A COUNTY IN MISSOURI CAN HAVE NO SUCH IMPLIED POWER. THE LEGISLATURE INTENDED THAT THE HOLDER OF THE BONDS SHOULD LOOK TO THE COMMON FUND FOR CURRENT EXPENSES OR COUNTY PURPOSES, THEN AND NOW PROVIDED FOR BY GENERAL REVENUE LAWS, WHICH LAWS LIMITED THE POWER OF TAXATION FOR COUNTY PURPOSES.

The report of judgment upon the original return in this and other cases, (5 Dillon 193) is not authority as to some points presented herein, because the amended return varied materially from the original return. There is no dispute in the amended return as to relator's right to payment out of the fund collected for county purposes. With three points in said decision, plaintiffs in error are confronted, Firstly with the theory that the language of the 29th section of the charter, implied power to levy special taxes, and Secondly, that the general railroad law formed part of that charter, and that under its provisions special taxes might be levied and be enforced by mandamus. Thirdly, that the language of section 11, Art. 10 constitution of Mo., 1875, authorized a levy of special taxation. These propositions plaintiffs in error will endeavor to answer separately. The charter power read as follows: "It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company; and it may invest its funds in the stock of said company, and *issue the bonds* of such county, to raise funds to pay the stock thus subscribed *and to take proper steps to protect the interest and credit of the county*."

The court below held that the implied power to levy special taxes was conferred by the words italicized in said section, while plaintiffs in error contend that the intention was to authorize the issue of bonds to raise funds *and*

to protect the interest and credit of the county. In other words, that after the county court had pledged the faith and credit of the county by subscribing stock, they might protect that credit and the county's interests, either by investing its funds, i. e. paying for same with cash in hand in the general fund, or by issuing bonds payable at a future date out of said fund for county purposes.

That such was the intention of the legislature will hereinafter be shown by numerous illustrations.

In sustaining demurrer to the original return in this case, Judge Dillon,(5 Dillon) delivering the opinion of the court rested his decision upon three grounds, which Judge Treat followed in sustaining demurrer to the amended return:

Firstly, "That under the decisions of the United States supreme court cited, the relator would be entitled to the levy of a *special* tax, if such a tax is necessary to raise the means to pay his judgment, even if there was no statute in terms giving such a right, provided there was no statute provisions, *general or special*, regulating, expressly or by implication, such a right."

If the supreme court of Missouri had not declared "that the only taxes which can be levied by counties are such as are provided for by the statute, that the power of taxation is a sovereign power which belongs to the state, and which can only be exercised in pursuance of laws passed by the legislature for that purpose; that there can be no such thing as an implied power in a county court to levy a tax, the power must be clearly and expressly given by the statute,"—

State vs. Shortridge, 56 M. R. 130,
Carondelet vs. Picot, 38 M. R. 125.
McPike vs. Pen. 51 M. R. 63,

—if there were no objection to applying decisions made in cases against complete corporations like the cities of Topeka and New Orleans, to *quasi* corporations

like Missouri counties, whose peculiarly limited powers had been pointed out by decisions of the supreme court of Missouri, long before the making of contracts herein described,—

State vs. St. Louis Co. 34 M. R. 546.
State vs. Saline Co. 45 M. R. 249.
Opinion of supreme court, in response to the legislature, 55 Mo. R., 295; 62 Mo. R., 313; 49 Mo., 236; 49 Mo. R., 214,

—if we accept to the fullest extent the doctrine laid down in Loan Co. vs. Topeka, 20 Wall, and U.S.v.New Orleans, 98 U. S., I contend that the general statutes of Missouri have furnished the very exception provided for in said decisions, and that the limitation entered into the contract in this proceeding involved.

The levy of taxes for county purposes has always been limited by law in Missouri. The last law enacted prior to the making of the subscription and the issue of bonds herein read as follows:

Sec. 1 exempted seven classes of property, including household property not exceeding three hundred dollars.

Sec. 2 provided that "the several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties by a tax upon all property, and licenses made taxable by law for state purposes except what is herein excepted by this act, but the county tax shall in *no case* exceed the state revenue tax upon the same subjects of taxation, more than one hundred per centum for the same time, but the county court of St. Louis county is empowered to impose such additional taxes to pay fines, (sic) and for *other purposes*, as may be provided by law." (Laws of Mo. 1868, p. 142). How many bonds were comprised among those "other purposes" will be shown hereafter. The state revenue tax under the law then in force, (Laws of Mo., 1867, p. 157), and as amended for the last time, prior to

the making of the contracts herein involved, [Laws of Mo., 1869, p. 81,] authorized a levy of only one-fourth of one per cent for state revenue.

If the relator claims that the revenue law in force when the act of incorporation was passed, applies, he is met with a greater limitation, viz: that the county tax except in St. Louis county, shall in no case exceed the state tax more than 100 per cent. (Revised Statutes of Mo. 1855, vol. 2, p. 1349, sec. 1). The state tax was then only one-fifth of one per cent. (R. S. Mo. 1855, p. 1324, sec. 5.)

Only during a brief period (1877–79,) *after* the making of the contracts herein was the power to levy greater county taxes for payment of debts granted. Those acts were undoubtedly repealed by the law of March 8th, 1879, but the court below seemingly held that in so doing the obligation of contracts was impaired.

Plaintiffs in error concede that the revenue laws in force when the contracts were made, entered into and formed part of said contracts, and that any repeal of any right insured to relator by such laws would have impaired the obligation of contracts, but believe that relator will search in vain for authorities denying the right of the legislature to repeal laws passed after the contracts were made, even though they had changed the rights of relator instead of merely altering the remedy.

Not only is there no authority for the declaration of the court below (5 Dill. 197) that "the existence of implied power (to levy special taxes) would seem to have been assumed or contemplated in the legislation of Missouri," but the statutes afford overwhelming evidence to the contrary.

The charter power herein involved is a verbatim copy of the 14th section of the charter of the North Missouri railroad company. (Laws of Mo., 1851, p. 483.) Under that power the county court of Schuyler county had subscribed in December, 1854, for the county, to the stock of the North Missouri railroad company. As will be fully

seen from a description of this act, and relevant decisions, (in a subsequent portion of this brief, to which I beg the earnest consideration of the court), nearly every reason which can be used against the application of the general railroad law of 1855 to the subsequent charter of 1857, herein involved, favored its application to that of the previous charter of 1851.

And yet seemingly convinced that neither the special charter power nor in the absence of an election, the general railroad law conferred power of special taxation to pay bonds issued for that subscription, the legislature of Missouri, Dec. 13th, 1855, (Laws of Mo., 1855–6, page 47), by a special act authorized the county court of Schuyler county to borrow money to pay said subscription previously made and to levy a special tax to pay the interest on said bonds, if it was deemed more expedient to pay same by direct taxation.

If, as is claimed by relator herein, the similar special charter power, by authorizing county courts "to subscribe stock and invest its funds in such stock, and issue the bonds of such county" to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county, implied the right of unlimited special taxation to pay such bonds, not even declared in the charter to be negotiable or interest bearing obligations, what need was there for this special act of Dec. 13th, 1855? Although this special act undoubtedly authorized special taxation to pay a railroad bonded debt without an election; although the general railroad law of 1855, by its 34th or "heretofore" section, authorized special taxation to pay bonded indebtedness incurred for any subscription previously made; although the record therein showed that the subscription was previously made in Dec. 1854, we find the supreme court of Missouri in 1869, in

Barrett vs. Schuyler, 44 M. R. 199—201,

resting its mandate not upon any implied power in the

special charter, not even upon the special act dispensing with an election, but upon the ground that inasmuch as the extraordinary agreed case showed that the county, (and not as herein, limited agents like the county court) by its duly authorized agent, voted said stock for more than twelve years, and issued the bonds more than ten years prior to said decision, these acts of estoppel warranted an innocent holder in assuming that if an election was required by law, (i e the general law as modified by the special act) it had been held; and therefore required the county court of Schuyler county to levy a tax not designated as a special tax, for the payment of said bonds.

That the special taxing powers contained in the 34th, 33d or 31st sections, and the right to mandamus in the 35th section of the general railroad law of 1855, could not enter into any charter without the companionship of section 30, (or 17 G. S., 1865), requiring an election, I have, in this brief, elsewhere shown, to be supported by decisions of this court and of the supreme court of Missouri.

The reports of the courts of Missouri show that St. Louis county not only was authorized to subscribe, but had, prior to 1855, subscribed and issued bonds to several railroad companies under special charter powers (e g, L. M., 1853, p. 376) similar to that herein involved, and yet we find that on the 28th of February, 1855, the legislature of Missouri enacted a law specially empowering the county court of St. Louis county to levy special taxes "to pay the interest upon bonds of said county issued, and that may hereafter be issued." (Laws of Mo., 1854–5, p. 450.)

See laws of Mo. 1854-5, p. 473. "An act to authorize the county court of Ralls county, to borrow money to pay the indebtedness incurred in constructing plank roads."

Sec. 2 authorizes the issue of bonds, not exceeding ten thousand dollars.

By sec. 3. "The said court is further authorized and empowered to levy a special tax, to pay said bonds as they mature."

See laws of Mo. 1854-5, p. 481, sec. 3, authorizing the county court of Scotland county upon the petition of a majority of the tax payers, to levy a special tax to pay bonds which by previous provisions they were empowered to issue. See laws of Mo. 1855-6, p. 32, authorizing county court of Randolph county to borrow money.

See laws of Mo. 1854-5.—"An act to authorize the county court of Clay county, to levy a special tax."

Not only was this special legislation deemed necessary in regard to railroad subscriptions, under powers identical with that herein involved, but in every instance where power was granted to issue county bonds; in illustration of this point, see

"An act to authorize the county court of Scotland county, to borrow money for certain purposes." (Laws of Mo. 1854-5, p. 481.) By sec. 1 and 2 of said act the county court was first fully authorized to issue bonds in the usual form to build a court house, and by sec. 3, it was separately provided, "The said county court shall have power upon the petition of a majority of the tax payers of said county to levy a special tax for the purpose of paying the interest on the bonds herein provided for, and for discharging the loan when they may think the interest of the county shall require it."

See also laws of Mo. 1868, page 263. "An act authorizing the county courts of Madison, Wayne and other counties to levy a special tax for the purpose of paying the debts of said counties."

Under this act the first mandamus to levy special taxes to pay a judgment against a county, was issued by the supreme court of Missouri. (State *ex rel.* Robbins, v. County Court of New Madrid county, 51 M. R. 84.)

In this very important case the relator having recovered a judgment against New Madrid county, sued out an alternative writ of mandamus, charging that he had applied to the county court to levy a tax to satisfy it, which they refused to do, and asking for a peremptory writ to compel

them to provide by the necessary taxation for the satisfaction of said judgment.

The answer or return to the writ set forth that the county court was only authorized by law to levy a tax for county purposes to the amount of double the state tax, and that before the service of the writ a levy had been made of that amount. To this defense the relator, represented by the venerable William B. Napton, who during nearly forty years of his life filled with great honor the position of Judge of the supreme court of Missouri, replied that by the aforesaid special act of March, 13th, 1868, the county court of New Madrid county was authorized to impose an additional tax of five mills, for the purpose of paying its debts, and the supreme court held that relator was not compelled to await his chance of payment in rotation, from the fund raised by general tax for county purposes, because the special act aforesaid authorizing a special tax was not unconstitutional as claimed by the county court in said cause.

AN ANALYSIS OF RELEVANT DECISIONS INCLUDING THOSE RELIED UPON BY RELATOR, WILL SHOW THAT THEY FULLY SUSTAIN THE POSITION OF PLAINTIFFS, THAT NO LEVY OF SPECIAL TAX CAN BE ORDERED HEREIN.

State, *ex rel.* vs. Rainey, Supreme Court of Mo., (Central Law Journal, vol. 12. p. 587.)

This decision held that the original judgment could not be disputed collaterally but established conclusively against the county, a debt which the county was bound in some way to pay; that at the time the levy of tax to pay same was made in obedience to the mandamus, said levy was in conformity to laws of the state then in force authorizing county courts to levy taxes for the payment of county indebtedness, and that the payment of the tax could not be avoided upon the ground that the bonds merged in the original judgment were void under ruling of the state courts conflicting with that of the federal court.

The record shows that the levy of taxes of which Rainey contested, was made for the year 1878.

The revenue laws of Missouri required the levy of taxes for each year to be made at the April term of the county court.

Therefore it is evident that when in April 1878, the county court of Green county made the levy, the following law enacted on the 14th of April, 1877, had not been repealed:

"An act to provide for the levy of a special tax to create a sinking fund for the payment of county bonded indebtedness."

Sec. 1. The county court of any county having a bonded indebtedness, may in their discretion at the time of making the annual levy for county purposes, also levy a special tax not exceeding five mills on the dollar, which shall be extended and collected as other county, city or town taxes are required to be collected, &c. It will be observed that the tax levy ordered by the federal court in said case was twenty cents on the hundred dollars, or five mills on the dollar, as authorized by this act. The law it is true authorized the application of this tax to payment of county bonds only in the discretion of the county court, but the supreme court of the United States in

U. S. vs. Supervisors, 4 Wall. 435, and the Supreme court of Missouri, in
L. and D. R. R. Co., vs. Platte County Court, 42 M. R. p. 171, (1868.)

have long since declared that in such cases "may" meant "shall" and that the county court had no discretion.

Another law enacted on the 28th of April, 1877, entitled "An act to authorize the county courts of the several counties of the state, to levy a special tax to pay the valid floating indebtedness which existed at the date of the adoption of the constitution of 1875," authorized the county courts of the several counties of this state to levy an annual

tax on all property made taxable by laws of the state, &c., which tax shall be extended, collected and accounted for, as is now provided by law for the extension, collection and settlement of the county revenue, provided that *in no case* shall the annual levy exceed one percentum of such taxable property.

Sec. 2 repealed all conflicting acts, and sec. 3 declared that "there being several counties in this state whose revenue is insufficient to pay off their valid floating indebtedness, and also meet their current expenses, creates an emergency that demands the immediate enforcement of this act," &c. (Laws of Mo. 1877, p. 200.)

Both these laws in force in 1878, had been repealed when this judgment for peremptory mandamus was rendered on the 19th of April, 1879, by the act set up in the return, entitled "An act concerning the assessment, levy and collection of taxes, and the disbursements thereof," approved March 8th, 1879, [laws of Mo. 1879, p. 185.] Such was in the opinion of the court below the intention and effect of the act, but it was disregarded upon the ground that it impaired the objection of contract, made in 1870, seven years before the passage of the two acts referred to.

The words italicized by the supreme court of Missouri, in this decision, and the reasons, which the court assigns for refusing to consider the law of March 8th, 1879, demonstrate that the court of last resort in Missouri coincides with the legislature in the opinion that the sole right of relator therein to levies of special taxes, rested upon the special acts, the repeal of which was properly presented by the return of plaintiffs in error in this proceeding.

In the much cited case of

Flagg v. Palmyra, 33 Mo. R., 445,

there was not only the general statute in reference to judgments against cities, but also an amendment to the city charter (see laws of Mo. 1857, p. 431), authorizing the levy of a special tax to pay the bonds.

The case of

Neal v. Saline county, 48 Mo. R., 390, (1871,)

in which the county court of Saline county was required to levy a tax to pay said bonds, rested upon a special act of January 22, 1861, [Laws of Mo. 1861, p. 456, sec. 2,] requiring the levy of a special tax to pay the very bonds involved.

Not every claim against a county which is just, can be enforced by mandamus.

State v. County Court of Livingston, 51, M. R., 561

Counties of Missouri can have no implied power to levy taxes.

City of Carondelet v. Picot, 38 M. R. 125.
State v. Shortridge, 56 M. R, p. 130.
State v. Town of Pacific, 61 M. R., p. 158.

In 61 M. R. p. 158, the court say that a reduction of the claim to judgment, is contemplated by the statute, and cites the statute,(Wag. statute p. 617, sec.77,) which authorizes mandamus against authorities of any city or town to enforce levy of special tax to pay judgments. "Where the duty devolving upon the authorities is merely a general duty of providing for the payment of all indebtedness against the municipality, mandamus may not lie, (High Ex. Rem. sec. 369,) but where a special duty is made obligatory upon the authorities to levy and collect a tax for a particular purpose or to meet an obligation created by a special law, it may issue."

In Mansfield v. Fuller, 50 M. R., p. 339, 340,

the court concluded that the relators must reduce their claim to judgment, and that then they may be entitled to mandamus to enforce the payment of such

judgment out of the general funds of the county because it is not to be provided for in any particular manner.

In State v. Howard County Court, 39 M.R. 375, the law [laws of Mo. 1863-4, p. 39,] authorized county courts to give bounties to volunteers, to *borrow* money and to levy a *special tax* for the payment of same.

In State v. Bollinger County Court, 48 M. R, page 475.

the relator had no claim upon the county but only upon a certain fund in the custody of the county court. The court could not therefore have been sued.

In State *ex rel* White v. Clay County, 46 M. R. p. 234,

were involved warrants issued under a special act of Nov. 5th, 1857, [Laws of Mo. 1857, page 276.]

That act authorized the county court (by sec. 1,) to borrow money to build a court house; (by sec. 2,) to issue bonds of the county therefor, and (by sec. 3,) the said county court was empowered to levy a special tax in addition.

The case of Barrett vs. Schuyler county, 44 Mo. R., 1860, which was in the lower court, relied upon by opposing counsel, I have elsewhere shown to be a potent authority in our favor, resting not only on a special act authorizing a special tax, upon a possible application of the general railroad law, not admissible in this case, but also upon an estoppel upon the *county* confessed by agreed statement.

The first and only case in which the supreme court of Missouri has ever been asked to issue a peremptory writ of mandamus in a case at all similar to the one now under consideration, was

State *ex rel.* vs. Dallas county court, 72 M. p. 330,

wherein no levy of a tax was asked, and a majority of the court refused the writ upon the ground that

a power to county courts identical to that contained in the 29th section of the St. Louis and Keokuk railroad company was not a franchise of the company, and had been restricted by the prohibitory language of the act of March 23, 1861, making it unlawful and a penal offense to do what was done eight years thereafter in this case. The dissenting opinion merely contended that the act of 1861, entitled a supplemental act, etc., did not repeal the power contained in the special charter. This dissenting opinion does not touch the point pressed in this case, that there was no necessity for the repeal or restriction of the special power, because in the absence of special legislation, the judgment on bonds issued thereunder could only be paid out of the common county fund.

Nothing is said to the contrary of this theory, in either of the opinions of the Judges. The dissenting Judges in laying stress upon what was adjudicated in Smith vs. Clark county, overlooked the fact that the bonds in that case actually recited that they were issued under the general railroad law of 1855 (54 M. R , p. *62*.) Moreover it was admitted that the bonds were issued under the special charter power in 1864, before the taking effect of the constitution and revised statutes of 1865. That court, upon motion for rehearing, at page 80, distinctly declared that there was nothing in the opinion which intimated that power to county courts, in special charters were privileges which might not have been repealed either under the state constitution of 1865, or that of 1820, thereby affirming a doctrine recognized in State vs. Macon county, 41 M., p. 458, 1867.

The decision in Smith vs. Clark county was made in 1873, long after the contracts merged in the judgment in this case. The ruin which it has already wrought, resulted not so much from what it decided but from what it erroneously assumed to have been previously adjudicated. I do not believe that it is in the power of any one to produce a Missouri decision made prior to 1873, which did

more than declare, as in 41 M. R., 458, that although the power of county courts to subscribe stock and issue bonds, contained in special charters, might be repealed by apt words, that it was not intended to repeal such power by the organic and statute laws of 1865.

Although Judge Napton alone in 54 M. R., 58, intimated that the general railroad law of 1855, even when made applicable, might not require a vote of the tax payers as a condition precedent, the settled law then, and when the contracts herein were made, was otherwise. [L. & D. M. R. R. Co., vs. Platte county court, 42 M. R., 171, 1869.] More millions have been invested in real estate upon faith in the latter decision than have been or ever will be invested in county bonds.

In Knox vs. Aspinwall, 24 How., 376, the charter of the O. & M. R. R., under which the bonds were issued, required the levy of a special tax for their payment.

In Van Hoffman vs. Quincy, 4 Wall, 536-554, there were found to be several acts in force when the bonds were issued, requiring the levy of a sufficient special tax to pay said bonds.

In Riggs vs. Johnson county, 6 Wall, 166-186, there was a law authorizing a levy of special tax, an election and a record finding of the county court that such tax had been voted.

In Butz against Muscatine, 8 Wall 575, there was a law requiring levy of sufficient taxes to pay any judgment rendered against a city.

The United States vs. New Orleans, 98 U. S., 397.

—I do not think that an analysis of the opinion of the court in the above entitled cause, 98 U. S. 397, coupled with the subsequent action of this court in the same case, will sustain the construction which was placed upon it in this case by Judge Dillon.

The record in that case shows, 98 U. S., p. 386, that there was power to levy a special tax: the very power upon

which the relator relied in the last proceeding before this court. The record shows that there was no limitation as to the amount of revenue which the city of New Orleans might collect at the date of the charter power, but that long afterwards, in 1870, the limitation relied upon by the city was enacted. [Ray's Digest of the statutes of Louisiana, 1870, page 251, sec. 20.]

The strongest authority cited by Mr. Justice Field, in 98 U. S., 394, was the case of

Commonwealth vs. Commissioners of Allegheny county, 37 Pa., 284, 290.

At page 284 the supreme court of Pennsylvania distinctly declare that the omission to make provision for special taxation, implies that the bonds should be paid out of the fund for county purposes, arising from the annual levy of one per cent., provided for by sec. 13, p. 1360, statutes of Pennsylvania. To just such a fund, respondent in this case in vain invited relator's attention.

At page 290 the court recognizes the limitation of one per cent. fixed by far less restrictive language than that contained in revenue laws of Missouri elsewhere cited; and hold the return insufficient, because it is not shown that it has been levied as required by law, and moreover intimate that it would have been a sufficient return, that all of said fund was needed for current expenses of the county government. That the effect of the decision in the

United States vs. New Orleans, 98 U. S.,

was not to authorize a special or an unlimited tax to pay the judgment, is shown by the fact that relator came back to this court seeking relief through the special tax provided for in the charter.

United States vs. New Orleans, Central Law Journal, vol. 12, p. 404.

The reasoning of this court in

United States vs. County of Macon, 99 U. S. 590,

does not sustain the construction placed upon it by the court below: on the contrary, this court favors our theory, that the general statutes limited taxes for county purposes, in saying, "thus while the debt was authorized, the power of taxation for its payment was limited by the act itself, and the general statutes in force at the time, to the special tax designated in the act *and such other* taxes applicable to the subject, as then were or might thereafter, by general or special acts, be permitted."

Another point which should be kept constantly in view, is the fact that, the city of New Orleans, the city of Topeka, as well as the counties in Kansas and Pennsylvania were complete municipal corporations. Such a title was never even applied to a county in Missouri prior to the constitution of 1875.

In Missouri the settled law at the date of the contracts herein was, that "a county is a *quasi* corporation or political division of the state, not a private corporation, but itself an agency of the state government," performing in part the duties of the government as an auxiliary of the government and a trustee for the people; that in so far as it *is a corporation it must act strictly within the limits of the powers conferred upon it by the act creating it.*

Ray county vs. Bently, 49 Mo. R., 236, 1872.
State vs. St. Louis county, 34 Mo. R., 546 1864.
Barton county vs. Walser, 47 M. R., 202, 1871.

The county in which plaintiffs in error performed the duties of a county court was first established as a county, before the admission of Missouri as a state of the Union. (1 Terr Laws, 651, 573). All that any subsequent legislation did was to recognize such a county by name as a political subdivision of the state, and from time to time

define and reduce its boundaries, until at the date of the contract herein involved, those boundaries actually contained less than the area of five hundred square miles, required by the organic law. (Gen. Statutes of Mo. 1865, p. 190, 193, secs. 24 and 36)

Under the common law restrictions in force after January 17, 1816, counties in the territory or state of Missouri had not even power to make contracts or to sue or be sued, until the Revised Code of 1825, p. 243, by an act entitled "An Act to enable counties to make contracts, hold and convey real estate," gave power in a certain manner so to do.

No other mode of obligating a County was invented until the acts incorporating the North Missouri, the Pacific and other railroad companies were passed, (Laws of Mo., 1851, 485, sec. 14. Laws of Mo., 1849, p. 222, sec. 14), containing the identical language of section 29 of the act incorporating the St. Louis and Keokuk railroad company, herein involved. (Laws of Mo., 1857, p. 125). I have elsewhere shown in this brief, that the legisture and the courts then recognized the fact that bonds issued under this special power should only be paid out of the county funds on hand, or out of the subsequent surplus of funds arising from the general levy of a limited per centage for county purposes, after paying expenses of county government. The only other power to county courts to bind counties by subscribing to stock of railroad companies, and by issuing bonds to raise funds to pay same, was found in the general railroad law, first adopted in 1853, and re-enacted with some modifications in subsequent revisions of the statutes.

This general railroad law always required the condition precedent of assent of a majority of the tax payers, or of a majority, or two-thirds of the qualified voters of the county. In that railroad law alone was power conferred for levy of special taxes to pay debts thereunder contracted. In no other way, than under specific statutory power, could

county courts in Missouri obligate a county. It is true that after the contracts herein involved, the supreme court of Missouri held in decisions that county courts under these special charter powers, were not governed by the general railroad law, and therefore had no power to issue bonds without the assent of tax payers or voters, but no court has yet decided that such obligations can be enforced otherwise than out of the fund for county purposes.

It is true that in

H. & St. J. R. R. Co. v. Marion County, 36 Mo. R., 303,

the supreme court used language *arguendo* which has been elsewhere unjustly construed into a declaration that county courts were general agents of the county, but on the contrary, in a *subsequent* decision in the same volume, the same court through the same judge declares "The powers of the county court and what precise relation it bears to the county we are to ascertain from the numerous acts which have been passed from time to time by the legislature conferring power upon it; it is *nowhere declared that the county court is the general agent or representative of the county*,—it is a part of the state government, with specific powers, duties and functions generally, local to the county it is true, but derived from the state and not from the county, and subject to be changed at the will of the legislature without regard to the will of the county. It acts independently of the county in obedience to state laws; duties imposed upon the county court by the legislature, it performs as acts of obedience to the legislature directly as a state functionary, and not as an agent of the county. It is true that it can bind the county in some contracts, subject it to some legal obligations, and appropriate its money to certain objects, but these powers it exercises by virtue of authority derived from the state government and in obedience to state laws."

Reardon v. St. Louis County, 36 Mo., R., 561, (1865.)

This doctrine has been repeatedly affirmed by the supreme court of Missouri, notably in

Ray County v. Bently, 49 M. R. 236, (1872.)
And Township Board v. Boyd, 58 M. R. 279, (1874,)

and renders inapplicable to this and to many Missouri bond cases doctrines laid down by this court in cases like

Lynds v. The County, 16 Wall.
And Supervisors v. Schenck, 5 Wall.

It is part of the history of the State that shortly after the power to make contracts was granted to counties, (R. S. 1825, 243, sec. 4,) the county courts of many counties abused that power; under authority of law built court houses, jails, etc., and created debts, regarded as onerous in those primitive days. Although the fullest discretionary power was given to county agents in the creation of debts for all the purposes then authorized by law, although those laws contained authority to create the debts, under just as general a power as is claimed for special charter railway bonds, without *therein* providing for means of paying said debts, nobody doubted that the tax for county expenses, constituted the only fund out of which judgments against counties could be paid, without the aid of some special legislation authorizing the imposition of a greater tax. Therefore the legislature was frequently called upon to pass such acts as the following of Jan. 17th, 1831:

SEC. 1. The several county courts in this state shall have authority to increase the rate of taxation to be levied for county purposes in their respective counties from time to time, whenever in the judgment of the said court it may be deemed expedient to do so, in order to enable the said county to pay off its *outstanding debts*, provided that the county tax shall at no time be raised so high as to exceed the rates of taxation in said county for state purposes. (Laws of Mo. 1831, 2 Terr. Laws, 259.)

Let it be noted that this was six years after county courts had, under separate laws, received general power (without limitation in such act) to create debts by building court houses, jails and other county buildings, and after such serious embarassment had arisen, that by one section of this very law of 1831, power was given to county courts to compromise or adjust in an equitable manner such debts.

The revised codes of Missouri prior to 1865, contained authority to county courts to build court buildings whenever they deemed it expedient so to do, either when there were sufficient funds in the treasury, or *the circumstances* of the county will *otherwise permit.*

So it is evident that for fifty years the general county revenue (now and at the date of the contracts herein involved,—one-half of one per cent,) has constituted a fund out of which alone any county debt not protected by a provision for special taxation must be paid.

This court in

U. S. v. County of Macon, 99 U. S. 501,

called attention to the fact, that no statute had been produced by the relator therein showing that a judgment creditor had against any county in Missouri, any right to a levy of taxes which he did not possess before the claim was reduced to judgment.

It is not in the power of any one to produce such a statute.

Though the holders of special charter bonds could not obtain mandamus in a federal court before judgment. no such rule applies to the state courts, in cases wherein specific taxation was authorized. The court reports of Missouri, during the past thirty years contain many such cases, but I challenge the production of a single case, sustaining relator's position.

III.

The second ground of the decision of the court below, intimating that the mandamus was justified by the language of sec. 11, art 10 of the constitution of Missouri of 1875, is refuted by other sections of said constitution, and by numerous interpretations of that constitution and of others which preceded it.

The supreme court of Missouri has invariably held that such provisions including the very section upon which Judge Dillon laid stress are inoperative until supplemented by legislation.

Fuss v. Spaunhorst, 67 M. R. 256, (1879).

St. J. & D. R. R. v. Buchanan County, 39 M. R., 485, (1867.)

Town of Cameron v. Stevenson, 69 M. R., 372.

St. J. B'd v. Patton, 62 M. R. 449.

Even where the people had voted the tax it was declared void because the law had not been passed, when the vote was taken.

State v. St. Louis R. R. Co., Supreme Court of Mo., Oct. term 1881,

reported in Central Law Journal of January 31st, 1882.

The only legislation in aid of said constitution, was contained in these two laws of 1877, which were not only impliedly repealed by the aforesaid act of March 8th, 1879, but also specifically repealed by sec. 12, of an act entitled "An act to enable counties, etc., to fund any part of their bonded debt, &c., after first submitting same to a vote of the qualified voters, &c., and repealing certain acts in said law named, and all other conflicting acts, &c., and including those herein referred to. (Laws of Mo., 1879, page 53.

Sec. 10 of art 10, con. of Mo. 1875, prohibited the

general assembly from imposing taxes upon the property of inhabitants of counties for county purposes but authorized the passage of general laws vesting in the authorities of such county, power so to do.

IV.

THE COURT BELOW (5 Dill 204) CONCEDED THE INCONTROVERTIBLE FACT THAT THE SOLE STATUTORY AUTHORITY RELIED UPON FOR THE MANDAMUS HEREIN, WAS CONTAINED IN THE GENERAL RAILROAD LAW OF MISSOURI. THAT PROVISION (sec. 22, ch. 63, General Statutes of 1865, p. 339,) MANIFESTLY RELATED TO DUTIES IMPOSED UPON COUNTY COURTS BY THE SPECIFIC TERMS OF SAID GENERAL RAILROAD LAW. ONLY THREE SECTIONS OF SAID LAW AUTHORIZED TAXATION. TWO OF SAID SECTIONS, 18 and 20, ARE EXPRESSLY LIMITED TO SUBSCRIPTIONS MADE IN CONFORMITY TO THE CONDITION PRECEDENT OF AN ELECTION, CONTAINED IN THE SECTION PRECEDING THEM. THE POWER IN THE REMAINING SECTION 23 IS SPECIFICALLY RESTRICTED TO COUNTY COURTS, WHICH HAD, PRIOR TO THE DATE OF TAKING EFFECT OF SAID LAW, FIRST ENACTED IN 1853, AND REVISED FOR THE LAST TIME IN 1865, I. E. "HERETOFORE SUBSCRIBED TO THE CAPITAL STOCK OF ANY RAILROAD (SIC.) IN THIS STATE." EVEN THOUGH UNDER THE SPECIAL CHARTER, POWER WAS IMPLIED TO IMPOSE TAXES, SUCH IMPLICATION CAN NOT COMPRISE THESE SPECIAL TAX PROVISIONS OF A LAW WHOSE PROHIBITIONS ARE CONFESSED BY RELATOR TO HAVE BEEN PLEADED IN VAIN AS A BAR TO HIS JUDGMENT.

The general railroad law contained in the Laws of Missouri since 1853, revised in 1855, and chiefly continued in force in the last revision of 1865, contained the following section, which has never been altered since 1853:

All existing railroad corporations within this state, and such as *now or* may be hereafter chartered, shall, respectively, have and possess all the powers and privileges contained in this act; and they shall be subject to all the du-

ties, liabilities and provisions, not inconsistent with the provisions of their charter, contained in this act.

Relying upon this section "the communities burdened with oppressive debts," of whom Judge Dillon speaks, have in vain claimed in this, and many other cases, that section 30, general railroad law in force when the charter herein was granted, entered into and formed part of said charter, because not repugnant to it. The earlier decisions of the supreme court of Missouri, all made after the contracts herein, have been construed and followed by this court, as precluding such a theory. Under these decisions judgments for millions of dollars have been rendered against counties in cases like this, in which the record confesses that in the making of the contracts merged in said judgments, the provisions of all of said general railroad laws, requiring at the outset the assent of a majority of the tax payers, afterwards a majority or two thirds of the qualified voters of the county, were violated. I contended before Judge Dillon that it was not sound to reject so much of the general railroad law as would have barred the judgment upon the bonds, and then to accept just enough correlative sections of the same general railroad law to insure the judgment creditor a special levy of thirty per cent. of the entire subscription instead of the modest fund of one-half of one per cent. otherwise offered him.

Although the court stated that "the force of this objection is felt," (5 Dill. 201) the conclusion reached, nevertheless, was that sections 31 and 34 of the general railroad law of 1855, [designated as sections 18 and 21 in the general statutes of 1865], which authorized the levying of special taxes as therein specified, "have the same force and effect as if they had been contained in the charter." The opinion, at page 204, admits that only in section 35 (2 L. S., 1865) of the general railroad law was to be found the local authority for mandamus. So that only by declaring that the sections referred to formed part of the charter, can the judgment herein be sustained. The rela-

tor relied in the court below upon the decision of the supreme court of Missouri, in the case of

State ex rel. Watkins vs. Macon county court, 68 M. R., 39, (1879.)

as sustaining the proposition that the 31, 32 and 34 sections of the general railroad laws of 1855, designated as sections 18, 19 and 21 in general railroad law of 1865, formed part of the charter herein, and authorized a mandamus for levy of special taxes.

A careful reading of this case (68 M. R., pp. 44 and 45) will undoubtedly establish the fact that the supreme court of Missouri regarded a vote of the people as a condition precedent to any levy of special taxes under the general railroad law. The supreme court of Missouri quote just enough of section 30 and 31 to make it possible to mislead one unfamiliar with those sections upon which I propose hereinafter to comment. All that the supreme court of Missouri endeavored to demonstrate in that case was that the fund for "county purposes," or expenses, could not be subjected to payment of county bonded debts; that the court was wrong in that position, is not only shown by the decisions of the supreme court of Missouri and the state legislation, elsewhere cited in this brief, but also by the ruling of the supreme court of the United States in a case between the same parties—99 U. S. 501, U. S. vs. Macon county court—wherein Chief Justice Waite, delivering the opinion of the court, not only adjudged that such debts must be thus paid in the absence of other sufficient provision, but also declared that "the power of taxation contained in the general railroad law is clearly confined to subscriptions authorized by that act which required the assent of two-thirds of the qualified voters of the county."

If the court will have the patience to follow this discussion, I will endeavor to demonstrate, that the observations of Judge Norton, 68 M. R. 44, and of Chief Justice Waite, 99 U. S., concerning the sections of the general railroad

law cited, instead of being antagonistic, as assumed by Judge Dillon, were entirely harmonious, and are not limited to the special cases in which they were made.

It has been shown in the statement that as early as 1853, a general railroad law was enacted in Missouri. By sec. 18, page 1084, [revised statutes of Missouri, 1855] this general law was repealed, because said statutes contained a revision of said law; many of the provisions of said law of 1855, have since remained unchanged, and such of said sections as have not been amended "are to be construed as continuations of the law of 1855, and not as new enactments." [Sec. 2 and 5 general statutes of Mo., 1865, p. 882 and 883.] But by sec. 6, p. 883, all acts of a local, private or temporary nature, if not repealed by or repugnant to the revised statutes were continued in force.

The revision of 1865 only altered three sections of the general railroad law of 1865, viz: sec. 30, concerning condition precedent of election revised and materially altered as sec. 17. Sec. 31, altered but not materially, concerning levy of special tax, revised as section 18, and 35 concerning mandamus, revised as section 32 by substituting the words circuit court for "criminal court," the latter a tribunal unknown to the law in 1855, except in St. Louis county.

Only three sections of the general railroad laws of 1853, 1855 or 1865 contained any reference to taxation.

In the revision of 1865, section 31 (designated in the revision as section 18,) was revised by alterations in the language so as to make merchant's licenses subject to taxation, as was confessed had not been correctly done in the revision of 1855. A portion of section 31, exempting cities from taxation, under certain circumstances was also omitted, but in both laws were contained the following words, "upon the making of such subscription as provided for in the preceding section," the county court making such subscription shall have power to issue bonds or to levy an annual special tax not exceeding thirty per cent. of the amount of such subscription.

Common sense and every known rule of construction sustain the proposition that the language quoted, imported into said section the preceding section 30 in the law of 1855, and 17 in the law of 1865. Said preceding section 30, in the law of 1855, provided that county courts might "subscribe to the capital stock of any railroad company *duly organized* under *this or any other act* in this state," and that the said county courts may, *i. e.* "shall" (42 M. R., 171, 1869,) for information, cause an election to be held, to ascertain the sense of the tax payers of such county as to such subscription, and as to whether the same shall be paid by issue of county bonds, as the case may be, *or by taxation*. For the full text of these sections, see pages 13, 14 and 15 of statement. Under the law of 1865, the same rule of construction made the substitute for section 30, *i.e.* the preceding section 17. (R. S. of Mo. 1865, p. 338,) part of the sections succeeding it.

Said section 17 thus incorporated with the succeeding section read thus, "It shall be lawful for the county court of any county to take stock for such county, etc., in *or to loan the credit* thereof to any railroad company, *duly organized* under this or any other law, provided that two-thirds of the qualified voters of such county, etc., at a regular or special election to be held therein, shall assent to such subscription." It should be constantly remembered that it was confessed by relator (printed record p. 14,) that neither the assent of the tax payers, as required under sec. 30 of law of 1855, nor the assent of the resident voters, as required under the law of 1861, nor the assent of qualified voters, as required under said section 17 of the law of 1865, had been obtained for any subscription of stock or for the issue of bonds merged in the judgment. If this section known as number 31, in the law of 1855, (and amended as section 18 in the law of 1865,) formed part of the charter, it carried with it the preceding section whose conditions precedent either as provided in sec. 30 or the amended sec. 17, relator confessed, had not been complied with. The

judgment was obtained upon the sole ground, that those sections known as 30 and 17, did not enter into the charter of the St. Louis and Keokuk R. R. Co., but were inconsistent with the separate power contained in section 29 of said charter.

Such was the view of the supreme court of Missouri, in

Smith v. Clark County, 54 M. R. 80, (1873,)

repeatedly followed by this court.

The next section of said general railroad law authorizing special taxation, was section 33,(sec. 20 in the law of 1865,) read as follows:

"Any county subscribing for railroad stock which shall have internal improvement funds, or overflowed or swamp lands, granted to it by the state, may apply such funds, or mortgage or sell such overflowed or swamp lands, to pay such subscription or any part thereof, and provide for the remainder, if any, *by the tax as aforesaid*; and any county or city subscribing as aforesaid, may (if so required by the railroad company, to raise funds to pay the installments in anticipation of the collection and payment of its railroad tax,) issue the bonds of such city or county, or denominations not exceeding one thousand dollars, and bearing interest at a rate not exceeding *seven* per. cent. per annum."

In order to force upon relator this very issue now made, we pleaded among other defenses in the original suits (see printed record in number 204, page 68, Oct. term, 1881,) as the record shows that the special charter power contained no provision as to the interest the bonds might bear and that this section 33 of the general railroad law, in force when the charter was granted in 1857, continued in force as section 20 of the revision of 1865, was not inconsistent with the charter and limited the interest upon bonds to seven per cent. The counsel for relator promptly produced the relevant decision of the supreme court of Missouri in

Beatie v. Andrew County, 56 M. R. 42,

which conclusively demonstrates that this section 32 (or 19) was to be construed with section 31, (or 18, law of 1865,) which in turn by its express terms makes the preceding section 30, [or 17, laws of 1865,] correlative with it.

Another illustration is found in sections 6 and 8 of charter of L. & D. M. R. R. Co., laws of Mo. 1859-60, as interpreted in

L. & D. M. R. R. Co. v. County Court of Platte County, 42 M. R. 175.

Section 6 of that charter, identical with section 29 of the charter involved in this case, conferred unlimited power upon county courts. Those obtaining the charter certainly had no need of the power of subscription contained in sec. 30, but they evidently were compelled to take it with the correlative sections they desired, authorizing special tax, etc., and mandamus. Not daring to submit to a vote of the people, the railroad company afterwards sought in the case cited, [42 M. R., 175,] to wrong the county by pointing out the 6th section of their charter, and claiming that it neutralized section 30, even though "may" meant "shall," but the supreme court of Missouri held there was no power to issue the writ of mandamus, because the condition precedent of a popular vote required by section 30 was wanting.

If in the suit upon coupons, the court below had not followed this view of the supreme court of Missouri (from which no earlier or later decision varies,) and regarded these sections as inseparable there could have been no judgment upon the coupons, and no necessity for discussing herein the means of enforcing it.

There remains only the 34th section of the law of 1855, [sec. 22 of the law of 1865,] to which relator clings with intense energy. It is manifestly the section which induced Judge Dillon to hold that the taxing powers of the general railroad laws, entered into the charter of 1857. This section read as follows:

Any county court or city which has *heretofore* subscribed to the capital stock of any railroad in this state, shall be entitled to the privileges, and subject to the liabilities of other stockholders in such company, and the county court or city council *shall have all the rights and powers* to provide funds to pay *such subscription* as are granted to county courts and cities by this act, and may levy a *special tax to pay the interest on their bonds*, or to provide a sinking fund to pay the principal.

This section 34 was never revised or altered after 1855; under the provisions of section 5 [general statutes of Mo., 1865, page 883,] it was not in 1865 a new enactment, but a continuation of the same law of 1855. Judge Dillon was therefore wrong in holding [5 Dill. page 187,] that the word "heretofore" in this section meant "prior to 1865." It really meant prior to the taking effect of the law of 1855, which took effect two years before the passage of the act incorporating the company whose charter is involved in this proceeding. But admitting for the sake of argument that Judge Dillon was right in holding that the word "heretofore" meant prior to the taking effect of the last revision of 1865, what could it avail relator. It is evident that in the haste, incident to the immense labors with which this great jurist was oppressed, he entirely overlooked the fact that from the outset it was confessed by relator, upon the record in this case, [see printed records, pages 14 and 12,] that no subscription was in anywise made to the capital stock of the St. Louis and Keokuk railroad company, either by the county or by the county court prior to 1868, and that the bonds were issued during or after 1870.

How under a law either of 1855 or 1865, could such a subscription be held to have been made heretofore, and endow plaintiffs in error with power conferred either three or thirteen years prior to 1868? The statutes of Missouri for fifty years have precluded the necessity of judicial interpretation of certain words, by defining their meaning. Section 1, chapter 9, revised code, 1865, page 83, (section

1, article 2, Wagner's statutes, page 887,) declares that whenever the word "heretofore" occurs in any statute it shall be construed to mean any time previous to the day when such statute shall take effect. The revised code of 1865, (G. S. Mo. 1865, p .882,) took effect on the first day of August, 1865, that of 1855, on the 6th of December, 1855, (R. S. 1855, p. 1827,) no subscription made after 1855, can properly be said to have occurred "*heretofore*," in view of the last revision perpetuating this section 34.

What was the motive for the special act of December 13, 1855. (Laws of Missouri 1855–6, page 47,) elsewhere discussed.

The act itself shows that the county court of Schuyler county had already subscribed for the county to the stock of the North Missouri railroad company, chartered in 1851, (laws of Missouri, 1851, p. 483,) with the identical power contained in the charter, granted in 1857, to the St. Louis and Keokuk railroad company, and herein involved.

The general railroad laws of 1855, was not like that of 1865, a partial continuation but an entirely new enactment. (R. S. of Mo. 1855, page 1026, sec. 20.) The 34th, or "heretofore" section of said railroad law was operative from the taking effect of said statutes of 1855, in Dec. 1855.

The subscription had been made in December, 1854, (44 M. R., 199.)

All the objections thus far urged against the application of the "heretofore" section of either of the general railroad laws of 1855 or 1865, to a subscription made in 1868, were wanting in the case which grew out of the Schuyler subscription to the North Missouri railroad company and yet the law makers of Missouri of 1855, and the disinterested persons who anxiously awaited the issue of the Schuyler county bonds were in accord as to the fact that the taxing provisions of the general railroad laws of 1853 and 1855 did not apply, for a reason fully disclosed fourteen years afterwards in the case of

Barrett v. Schuyler County Court, 44 M. R. 201.

They had obtained as usual without difficulty the consent of the county court, but they had not obtained the assent of the tax payers, the condition precedent of the 30th section of the general railroad law without which the county court was not under that law, the agent of the county: this section 30, not only entered into the 31st and 33rd sections already discussed, but under this early legislative interpretation, is shown to be equally applicable to the 34th or "heretofore" section, the only section of either of the general railroad laws which can properly be said to confer power to levy a special tax to pay bonds, because section 31 really presents the power of special taxation, as an alternative to the issue of bonds, which bonds without the aid of the 34th or "heretofore" section, might have been payable, as it is believed these special charter bonds are payable exclusively out of the common fund for county purposes, if the county had no property subject to execution or garnishment.

Another confirmation of the intent of the special act concerning Schuyler county, is found in the authority to sell the county swamp lands and appropriate the proceeds to the payment of the subscription. If anything but the failure to hold an election, prevented the general railroad law entering into this antecedent charter, why was it necessary to confer specially the power thus to sell and apply proceeds of swamp lands, which section 33, (20 R. S. 1865,) had already conferred under the general railroad law, which law by section 57, (48 R. S. 1865,) was declared applicable so far as consistent to every existing or subsequently chartered company.

Whatever may be said about the difference of opinion between this court and the supreme court of Missouri, as to their present ruling concerning the dicta contained in the unfortunate decision in

Smith vs. Clark County Court, 54 M. R., 58, (1873.)

there is no conflict between any decisions yet made by the

supreme court of Missouri, concerning the doctrine that the tax and mandamus provisions of the general railroad law were inseparable from the section requiring an election as a condition precedent, and from sec. 32,(20) which entirely exempting some stockholders from taxation, gives every share of stock as paid for in proper proportions to the individuals taxed, and not as in the special charter cases, to the *quasi* corporation known as a county whose assets are not only subject to execution, but may be diverted at the pleasure of the legislature to purposes foreign to the wishes of the people.

State v. St. Louis County, 34 M. R. 550.

V.

THE ACT OF MARCH 8, 1879, NOT ONLY IMPAIRED THE OBLIGATION OF NO CONTRACT, BUT GAVE THE RELATOR GREATER ADVANTAGES THAN HE POSSESSED UNDER THE LAWS IN FORCE AT THE DATE OF THE CONTRACTS HEREIN INVOLVED.

The relator's contracts of 1870 certainly could not be impaired by repealing the special tax laws of 1877. There was a limitation in the constitution of 1875, not yet interpreted by the supreme court of Missouri, which would seem to have precluded the legislature from enacting the the laws of 1877, authorizing special laws, and certainly justified their repeal, and that is section 19 of Article XII Revised Statutes of Mo., 1879, p. LXXXVI. "The general assembly shall pass no laws for the benefit of a railroad or other corporation, or any individual, or association, or individuals, retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past."

Relator can not complain if laws in force at date of his contracts prove insufficient.

This act of March 8, 1879, is the only existing law, except the railroad law, which authorizes mandamus to enforce the levy of special taxes. If it subserved any purpose except to supply the place of the repealed special tax laws of 1877, and to afford substantial comfort to bondholders, I am unable to perceive it. So far as it concerns the communities burdened with debts created without the consent of those usually required to pay them, if our theory is correct, it affords facilities for increased taxation not authorized at the date of the contracts, and was worse than useless to them; if, on the other hand, power can be implied under the charter for a county to levy special taxes, it merely alters relator's remedy with the invaluable supplement of specific authority to enforce it by mandamus, which he could not otherwise have done. If this law was valid it manifestly constituted a sufficient return.

VI.

IF ALL THAT RELATOR CLAIMED WAS TRUE, THE AMENDED RETURN OF RESPONDENTS (printed records, pages 15, AND 17,) WAS STILL SUFFICIENT.

The return stated that an adequate sum had been collected to pay the coupons, and designated the persons to whom, under the statute, the funds in the treasurer's hands had been loaned, [See printed record, p. 15 and 17.

Not only did this part of the return demonstrate that the county authorities had already performed any duties which may have been imposed upon them prior to the repeal of laws authorizing special taxation, but also proved that relator could, by garnishment, an ordinary process of law, have collected the amount of his judgment.

The United States district court for the eastern district of Missouri, has, from the outset, sustained such garnishment proceedings. The only case reported in the law journals is that of

George vs. Ralls county, Chicago Legal News, vol 14, p. 20.

The plaintiffs in conformity to stipulation authorizing the filing of such additions to the record herein, submit to this court certificates of the clerk of the court below, showing that a sufficient sum to pay the entire judgment herein was distributed among divers judgments, some junior in date to the judgment in aid of which the writ herein issued. Mandamus does not lie when there is an adequate legal remedy.

State vs. Howard county, 39 M. R , 375.

VII.

UPON RELATOR'S ADMISSIONS, THE WRIT OF MANDAMUS SHOULD HAVE GONE TO THE TREASURER.

Under the facts shown by the record, if the relator had any rights, they were against the county treasurer, an official beyond respondents control, and not against the county court. To him, if to any one, should the mandate of the court have gone.

State ex rel Lane vs. Craig 69 M. R., 568.

Relator herein [printed record, p. 3, 4,] swore that a sufficient sum had been collected for the express purpose of paying the coupons, merged in his judgment; that he had demanded payment of the treasurer, etc. It is true that the coupons in the case of Lane vs. Craig had been issued to a company under the provisions of sections 18 and 21 of the general railroad law of 1865, which we have elsewhere shown, can not be invoked by relator, but fully applicable herein is the principle that when a treasurer in any way becomes possessed of any special fund, collected for payment of coupons, he alone is responsible for any diversion of such fund; if relator was entitled to said fund, either under implied power or a partial and inconsistent importation of general railroad law, as held by the court below, it was of no avail to plead that the county conrt had

made orders transferring the fund, etc. It may be worthy of note, that this opinion of the court was delivered by Chief Justice Sherwood, who also delivered the opinions of the court in

State ex rel. vs. Dallas Co. court, 72 M. R 330, and in
State ex rel. vs. Garronte, 67 M. R., 445,

refusing mandamus for tax to pay special charter bonds.

In Missouri a party may make any return to a writ of mandamus, which, in any way shows that relator is not entitled to the relief he seeks.

State vs. Ray county court, 52 M. R., 27.
Tapping on Mandamus 579, (Am. Edition 419.)

VIII.

The peremptory writ and the order therefor, were fatally defective in failing to point out clearly and distinctly the duty to be performed. They ordered both a warrant on a special fund (which the return showed had been loaned out, as required by law) and an immediate levy and collection of special taxes

State ex rel, vs. Trustees of Town of Pacific, 61 M. R.
High Extr. Legal Remedies 359.

IX.

THE PEREMPTORY WRIT AND THE ORDER THEREFOR, DISREGARDED ALL STATE LAWS ORGANIC OR STATUTE.

It commanded the county court forthwith to levy and and collect a special tax. Section 3 of article 10, of the constitution of Missouri, (revised statutes of Mo., 1879, p. LXXX,) required all taxes to be levied and collected by general laws.

The levying of taxes is a matter solely of statutory crea-

tion, and no means can be resorted to in coercing their payment other than those pointed out in the statute,

State v. Shortridge, 56 M. R., 130.

The revenue laws quoted in the statement, indicate that the duty of the county court is confined to making in May of each year the necessary levies, authorized by law and that the collector, an independent officer, is charged with the collection, he could not have enforced taxes upon personal property until October, 1870, and upon realty for two years thereafter.

To require the court to collect, violates the doctrine enunciated by Mr. Chief Justice Waite, in original No. 11, ex parte, Rowland U. S. Supreme Court, October term, 1881.

Under the peculiar revenue laws of Missouri, the duties of county courts in connection with the levying of taxes comprise many duties, which are not ministerial but judicial.

Miltinberger vs. St. Louis, 50 M. R., 172.

Ranney vs. Boeder, 67 M. R. 479, and cases there cited.

When the county court acts judicially its discretion can not be interfered with.

Trainor vs. Porter, 45 M. R. 306.

The records in all of the cases wherein judges of Lincoln county court are plaintiffs in error shows that the obligations merged in the judgment, were countersigned or actually issued after March 30, 1872, in violation of the registration law, (Laws of Mo., 1872, p. 56,) which declared such instruments void. If this court in No. 204, October term 1881, should hold that the bonds were not *valid* for the reason stated it should of course dispose of the relator's rights in said Lincoln cases, but if a contrary ruling is made in that case, it may still be asked whether un-

der the confession of relator as to the date of countersignature, &c., the repeal of the power to county courts, contained in the charter, on this January 30, 1872, did not reduce a bond issued thereafter into an ordinary debt of the county payable out of the common fund. It should be noted that the power to subscribe was entirely separate and distinct from the power to issue bonds to raise funds, &c. The subscription could have been paid out of the other funds named in the charter. For the payment of bonds issued under the terms of the registration law of March 30, 1872, that act provided that the initiative in taxation to pay the bonds should be taken by the state auditor, and not by the county court.

X.

To hold that the county court, a limited agent of a county (which is itself a limited agent or political subdivision of the State of Missouri, and not a complete corporation,) obtained under the 29th section of the act incorporating the St. Louis and Keokuk Railroad Company, implied power to levy unlimited special taxes, to pay any obligation of the county which it was thereby authorized to create, and that Federal courts possess implied power to compel the levy and collection of such special taxes through officers of the State, in defiance of the penal prohibitions of the State laws, is a practical confiscation of private property unauthorized by the Federal or State constitution, and a positive violation of the 14th section of the organic law of the Territory of Missouri, still continued in force.

The statement, page 18, shows that on January 30th, 1872, the legislature, and in 1875, the constitutional convention of the State of Missouri, repealed, if they had authority so to do, the 29th section of the act of February 16th, 1857, incorporating the St. Louis and Keokuk Railroad Company, the relator confessed (printed record, page 12,) that in all the Lincoln cases, the obligations were actually countersigned by the county agent and delivered after said date,

but that relator relied in the original suit upon the proposition that the 29th section was a privilege of the company, and could not be repealed, either by the direct laws of January 30, 1872 and 1875, or by the laws of February 16, 1872, and of March 8, 1879, which made it a crime for county judges to perform the duties required by the mandamus herein. If the solemn declarations to the contrary contained in the cases of Smith *vs.* Clark county upon motion for rehearing at 54 M. R., page 80, and in 41 M. R., 458, (1867,) are unavailing, to prevent such an enlargement of the doctrine of the Dartmouth College case, respondents may ask a far more reasonable application of the principle to the peculiar guaranty found in the 14th section of the organic law of the Territory of Missouri (U. S. Statutes at large, Vol. 2, p. 747) ever since continued in force.

Constitution of Mo., 1820. Revised Stat. of Mo., 1855, p. 86, Sec. 2.

Constitution of Mo., 1865. Gen. Stat. of Mo., 1865, p. 42, Sec. 3.

This section of the organic act granted by the United States Government on the 4th of June, 1812, declared that no man shall be deprived of his life, liberty, or property but by the judgment of his peers *and* the law of the land. In many instances courts, interpreting the guaranty of the 29th section of *magna charta*, as modified by the 35th chapter of the second great charter of King Henry III, A. D. 1217, substantially incorporated in the Constitution of the United States, have held that the disjunctive "or," preceding the words "the law of the land," made due process of law a sufficient mode of depriving persons of their property in divers instances without trial by jury. In the organic grant to the Territory of Missouri it will be observed that the word "and" was substituted for the word "or." Plaintiffs in error contend that this change ensures a trial by jury to several thousand individual property owners who were not parties to said judgment, or bound by the judgment herein, and therefore not yet subject to distraint or summary judg-

ment for any taxes other than the ordinary taxes for the support of the State and the county governments, designated as State tax, and tax for county purposes; that the machinery of the ordinary revenue law, as shown in the statement, is the only one under which the statute authorizes county officers to proceed in assessing, levying or collecting any tax; that neither said revenue law nor any which preceded it, provided for any trial by jury before distraint upon personality and the summary rendition of judgments against lands for special taxes, afterwards to be enforced by sales similar to execution sales by sheriff. The general railroad laws gave the stock to the tax payer for his individual benefit, even after he had voted the tax. The special charter gave nothing.

The statement shows that the constitutions of Missouri have always contained provisions precluding the taking of private property for any debt of municipal or *quasi* corporations.

XI.

No levy of taxes which the county court made or might have made in order to pay any interest coupons detached from the bonds, could constitute such an estoppel as to justify the final order, or the peremptory writ herein issued. In all the returns, excepting that in No. 280, the statement is made (printed records, pp. 14 and 16,) that taxes were levied and collected for the express purpose of paying the coupons of 1877 and 1878 merged in the judgment. It has been elsewhere shown that no law authorizing the levy of special taxes to pay such debts as are herein involved existed prior to 1877, that these laws made years after the relator's contracts were made, had not only been repealed prior to the date of the final order or the peremptory writ in this case, but were subject to an objection not yet passed upon by any court, viz: that they violated the 19th section of Article 12 of the constitution of Missouri, of 1875, in imposing obligations

upon counties unauthorized by organic or statute laws, at or prior to the date of the relator's contract.

This provision, and other provisions of said constitution, requiring legislation before any court could levy any taxes for county purposes, and limiting such taxation, precluded the county authorities from lawfully levying any special tax after the 30th of November, A. D., 1875, when said constitution took effect.

The records in all the proceedings against the county court of Lincoln county, (printed record, p. 14,) prove that relator confessed that bonds and coupons in the judgment merged, were countersigned and issued after the 30th of March, 1872, (the date of registration law elsewhere discussed.)

There certainly could have been no lawful pretext for levying taxes to pay interest prior to the date of issue, which was subsequent to March 30, 1872. The statement, page 18, quotes an act passed January 30, 1872, repealing all the power granted to county courts under the 29th section of the charter. There were, in said section, three separate and distinct powers: first, to subscribe stock; second, to invest funds on hand therein; thirdly, to issue bonds to raise the funds to pay the stock. The stock might be paid for without issue of bonds out of other funds, created by law and placed in the hands of the county court as a trustee, the subscription of stock did not necessarily imply the issue of bonds. Although the subscription had been made on the 30th of January, the bonds had not been issued; the reasoning of this court in sustaining the subsequent registration law of March 30, 1872, applies with equal force to the theory that the legislature had, on the 30th of January, 1872, power to withdraw the power to issue bonds to pay a previous subscription, if it had been made, instead of being merely recited in a bond executed and issued after January 30, 1872, and after March 30, 1872.

Anthony *vs.* Jasper County, 101 U. S., 699.

Announcing his conclusion that the taxing provisions of

the general railroad law might be invoked by relator, Judge Dillon, said :

"The correctness of this conclusion is placed beyond doubt by the practical construction of the legislation by the county courts, by the profession, and by this court. Down to this time special taxes have been levied by counties throughout the State to pay interest on railroad indebtedness, and the right to do this has never before been questioned, so far as the reported decisions show. The Federal courts in this State during the past six years, have issued many writs of mandamus, commanding the levy of special taxes of this character. Every objection which the zeal and the learned ingenuity of counsel representing communities burdened by oppressive debts could present against such writs has been presented, but never until now has this objection been urged."

When such reasons are advanced by a court in support of its judgment, plaintiffs in error should not be regarded as going outside the record in calling attention to facts forming part of the history of Missouri.

The records of few bond cases show that more than the requisite number of two of the judges approved of the creation of obligations, all issued without the consent even of those then authorized to vote at a time when nine-tenths of the property owners were disfranchised. The corrupt practices of county officials necessitated the enactment of a law, taking effect February 16, 1872, entitled, "An act to protect counties, cities and incorporated towns from combinations between railroad companies, county courts," &c., whereby it was made a felony for any justice of a county court thereafter to vote, to subscribe stock, or to loan the credit of such county to any railroad company, unless authorized so to do by a two-thirds vote of the qualified voters of such county, &c.

The title of that law is a sufficient commentary upon the legal value of the "practical construction," which county courts gave to taxation. Even this law was unheeded by unscrupulous county judges.

Those who presented the humble protests of tax payers

were sent to jail for contempt of county court. Not until the people of Cass county, goaded to despair, arose and killed the county court and county attorney of that county, was this shameless disregard of duty checked.

The record in the case to which this purports to be ancillary, and the records in other cases, (see record in No. 204, October term of U. S. Supreme court, Lincoln county vs. Douglass,) show that a long forgotten charter was seized upon as a pretext for obtaining the bonds of the county, without the consent of the people. The pleadings in said case confess that the county court records of 1869, denounced the pretended corporation as "a sham, and a fraud, without legal organization, capital stock, or authority," that no subscription had been made in 1868, as recited in the bonds actually issued in 1872, confessedly in defiance of the people.

That Judge Dillon was wrong in assuming that the right of county courts to levy such taxes, was never questioned by the people, cannot better be illustrated than by referring to the case of

Hopkins vs. Lovell, 47 M. R. 102, (1870,)

wherein an injunction was sued out to prevent taxation levied to pay interest on bonds, which had not then been issued by Lincoln county.

The record in that case proves that one of the counsel employed by the tax payers, voluntarily dismissed as to the only person authorized to issue the bonds, without making his successor a party. The comments of the court in that case show why the people were deprived of an adjudication of their rights, and how little they were responsible therefor.

The majority of writs of mandamus issued from Federal courts of Missouri, during the period of six years, 1873–1879, mentioned by Judge Dillon, were in township cases.

The township bond act especially provided for a levy of special taxes to pay the bonds. In the few cases which have resembled those now under consideration, it can scarcely

be said that the acquiescense of county courts, in such commands, had the weight of judicial authority, when it is added that in every instance of obedience the county courts made the levies either in order to get out of jail, or to avoid being sent to prison for contempt of the Federal court.

This court has refused to follow the later decisions of the supreme court of Missouri, declaring that there was no power to issue special charter bonds, without the condition precedent of an election, because earlier decisions were to the contrary effect. This case presents issues upon which the decisions of the court of last resort in Missouri are uniform and entirely in our favor.

Although it is too late to prevent judgments in Federal courts upon special charter bonds issued without popular consent, it is not too late to entreat this court to accord patient consideration to the intention of the law makers, and many authoritative interpretations of these laws, indicating the common fund for county purposes as the sole means provided by any law for paying relator's judgment.

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